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APPENDIX

In the

Supreme Court of the United States

October Term, 1971

No. 70-31

PORT OF PORTLAND, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

FILED OCTOBER 26, 1970
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1971

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Excerpts from the transcript of testimony are reprinted as shown in the transcript filed with the Commission. No corrections were requested by the parties.

In the

Supreme Court of the United States

October Term, 1970

No. 903

PORT OF PORTLAND, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

APPENDIX

DOCKET ENTRIES

1969

Dec. 3 Filed Complaint.

3 Filed Motion for temporary restraining order.

3 Issued Summons to marshal.

8 Filed Memorandum of law in support of temporary restraining order.

1969

Dec. 9 Filed Motion to intervene under Rule 24 FRCP of Southern Pacific Transportation Co.

9 Filed Motion to intervene as deft by Union Pacific Railroad Co.

9 Filed Answer of Union Pacific Railroad Company, Intervenor.

9 Filed Motion to intervene as deft (Spokane, Portland & Seattle Railway Co.) (3 copies recd 1-8).

10 Filed Motion of Chicago, Milwaukee, St. Paul and Pacific Railroad Co. for leave to intervene. Filed affidavit of service of above motion.

10 Filed and Entered Order permitting Chicago, Milwaukee, St. Paul and Pacific as pltf Railroad Co. leave to intervene.

10 Filed Complaint in intervention of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

10 Filed and Entered Order allowing intervention of Southern Pacific Transportation Co. as pltf.

10 Filed Complaint of Southern Pacific Transportation Co.

10 Filed and Entered Order (on Motion) allowing Union Pacific Railroad Co. to intervene.

10 Filed Union Pacific Railroad Co.'s Memorandum in opposition to motion for temporary restraining order.

10 Filed Order allowing intervention of Spokane, Portland & Seattle Railway Co.

1969

10 Entered Order that Mr. Warren H. Ploeger, Seattle, Washington, be permitted to appear specially in this case on behalf of deft Chicago, Milwaukee, St. Paul & Pacific RR Co.

10 Record of pltf's motion for temporary restraining order.

10 Entered Order postponing motion until after Dec. 15, 1969 or such time as a hearing and determination is made in this case.

10 Entered Order that case be tried on the merits.

10 BRIEFING SCHEDULE: pltfs 30 days after Govt files its answer; defts 30 days to reply, and pltfs fifteen days after defts file replies.

11 Filed Answer of Intervenor, Spokane, Portland, & Seattle Railway Co.

16 Filed and Entered Notification and Certificate of designation of three-judge case (12/15/69).

18 Filed Complaint of Intervenor-pltf Southern Pacific Transportation Co.

29 Filed and Entered Order designating United States Circuit Judge and United States District Judges pursuant to §§ 2284 and 2325, Title 28, United States Code (12/24/69).

1970

Jan. 6 Filed Answer of Intervenor-deft Spokane, Portland and Seattle Railway Company to Complaint of intervenor-pltf, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (with two copies).

6 Filed Answer of intervenor-deft, Spokane, Portland and Seattle Railway Company to complaint of intervenor-pltf, Southern Pacific Transportation Company (with three copies).

7 Filed Answer of intervenor-deft, Union Pacific Railroad Co. to complaint of intervenor-pltf Southern Pacific Transportation Co. (with three copies).

7 Filed answer of intervenor-deft Union Pacific Railroad Co. to complaint of intervenor-plt Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (with three copies).

28 Filed Answer of the USA with three copies.

28 Filed Answer of the USA to complaint in intervention of Chicago, Milwaukee, St. Paul and Pacific Railroad Company with three copies.

28 Filed Answer of USA to complaint in intervention of Southern Pacific Transportation Company with three copies.

28 Filed Answer of the ICC with three copies.

28 Filed answer of the ICC to complaint in intervention of Chicago, Milwaukee St. Paul and Pacific Railroad Company with three copies.

1970

28 Filed Answer of the ICC to complaint of intervenor-pltf Southern Pacific Transportation Company with three copies (all copies delivered this date).

29 Filed pltf's (The Commission of Public Docks of the City of Portland) motion to dismiss as to the Commission as party pltf.

29 Filed Summons with marshal's return.

Feb. 25 Lodged Brief of pltf Public Utility Commissioner of Oregon with three copies (cert copies delivered to Judges)—this date.

26 Filed Opening Brief of Southern Pacific Transportation Company with three copies (cert copies delivered this date).

27 Filed Opening brief of Chicago, Milwaukee, St. Paul and Pacific Railroad Company with three copies (cert copies delivered this date).

27 Filed Brief for the Port of Portland, Pltf (cert copies delivered 3/2/70).

27 Filed Affidavit of Service (copies-cert-delivered 3/2/70).

March 2 Filed Brief of Deft United States of America (cert copies delivered this date).

12 Filed and Entered Order (on stipulation) that defts have to and including April 29, 1970, to file their answering briefs (3/11/70).

12 Filed ORDER (letter) that hearing be postponed until June 22, 1970 at 1:30 p. m. (3/11/70).

1970

23 Filed Stipulation *re* record to be certified to District Court (Copies forthcoming).

April 2 Filed and Entered Order (on motion) that Brotherhood of Locomotive Engineers, a labor organization, may intervene as a deft (4/22/70) (cert copies delivered 4/23/70).

April 6 Filed True CERTIFIED Copies of Complete Record of Hearing before the Interstate Commerce Commission (Finance Docket 24679) BLUE BOX IN VAULT H-4 in the following volumes:

Vol. I Brief Dated June 14, 1968.

Vol. II Documents filed with Interstate Commerce Commission.

Vol. III "

Vol. IV Stenographer's Notes of Hearing Held February 29, March 1, 1968.

Vol. V Stenographer's Notes on Hearing Held February 26, 27, 28, 1968.

Vol. VI Exhibits Numbers 1 thru' 29, 31, 32, 34 thru' 62 filed at Hearing Held February 26, 27, 28, 29 and March 1, 1968.

Vol. VII Exhibit Number 30 (rejected) at Hearing Held March 1, 1968.

Vol. VIII Exhibit Number 33 (rejected) at Hearing Held February 28, 1968.

1970

28 Filed and Entered Order (on Stipulation) that defts have extension of time to file Briefs: defts have to and including May 6, 1970, to file Answering Briefs; pltf have from May 14 to May 21, 1970, to file reply briefs

28 Filed and Entered Order that defts have to and including May 6, 1970, to file answering briefs and Pltfs have to and including May 21, 1970, to file reply briefs (attached to above order) (cert copies delivered 4/30/70).

May 6 Filed Brief of Intervening Defts Spokane, Portland and Seattle Railway Co. and Union Pacific Railroad Co. with three copies (cert copies delivered 5/7/70).

7 Lodged Brief of the Interstate Commerce Commission with three copies (cert copies delivered 5/7/70).

21 Lodged Reply Brief of Pltf Public Utility Commissioner of Oregon with three copies (cert copies delivered to K, S, B).

21 Filed Reply Brief of Southern Pacific Transportation Company with three copies (cert copies delivered to K, S, B).

21 Filed Reply Brief for the Port of Portland, Plaintiff with three copies (cert copies delivered 5/22/70).

21 Filed stipulation for extension of time to file reply brief.

1970

21 Filed and Entered Order that pltf Chicago, Milwaukee, St. Paul & Pacific RR have to and including June 1, 1970, to file reply brief (5/20/70) (cert copies delivered May 25, 1970).

June 1 Lodged Reply Brief of Chicago, Milwaukee, St. Paul and Pacific Railroad Company with three copies (cert copies delivered this date).

June 22 Record of Trial before Three-Judge Court on decision rendered by ICC.

22 Entered Order case SUBMITTED

July 6 Filed Reporter's Transcript of Proceedings dated June 22, 1970.

9 Filed and Entered affirming orders of the Commission and dismissing complaint.

21 Filed letter designation of appeal to the Supreme Court of the United States (on behalf of plts. Southern Pacific Transportation Company and Chicago, Milwaukee, St. Paul and Pacific RR).

In the United States District Court
for the District of Oregon

Civil No. 69-696

Port of Portland,
Sam R. Haley, Public Utility
Commissioner of Oregon,
Commission of Public Docks
of City of Portland, Oregon,
Plaintiffs,

vs.

The United States of America
and Interstate Commerce Commission,
Defendants,

Chicago, Malwaukee, St. Paul
and Pacific Railroad Company,
Plaintiff in Intervention.

ORDER AND JUDGMENT

The Court finds that the report and order of the Interstate Commerce Commission (Commission), Division 3, decided June 6, 1969, and the orders of the Commission, Division 3, dated October 24, 1969, and November 21, 1969, in its Finance Docket Nos. 24679, 24890, and 24891, Spokane, Portland & Seattle Railway and Union Pacific Railroad Company—Control—Peninsula Terminal Company, 334 ICC 419, are supported by substantial evidence and are neither arbitrary nor capricious;

Now, Therefore, the orders of the Commission are affirmed, and this action is dismissed.

Dated this 9th day of July, 1970.

John F. Kilkenny
United States Circuit Judge

Gus J. Solomon
United States District Judge

Robert C. Belloni
United States District Judge

Served June 20, 1969

F-9530

Interstate Commerce Commission

FINANCE DOCKET No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY —CONTROL—PENINSULA TERMINAL COMPANY

Decided June 6, 1969

1. In Finance Docket No. 24679, acquisition by the Spokane, Portland & Seattle Railway Co., and the Union Pacific Railroad Co., of control of the Peninsula Terminal Company through purchase of capital stock, approved and authorized. Conditions prescribed. Petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Co., and the Southern Pacific Co., for inclusion in the transaction denied.
2. In Finance Docket Nos. 24890 and 24891, joint use, under section 3(5) of the Interstate Commerce Act, by Southern Pacific Co. of facilities of the Peninsula Terminal Company and trackage of the Union Pacific Railroad Co., found to be not in the public interest and applications denied.

Hugh L. Biggs, Charles W. Burkett, James Warren Cook, Richard Devers, Thomas H. Gonser, Randall B. Kester, F. J. Melia, Raymond K. Merrill, Warren H. Ploeger, Thomas H. Ploss, E. O. Schiewe, R. Paul Tjossem, John F.

1. This report also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co. —Common Use of Certain Terminal Facilities—Union Pacific Railroad Co.

Weisser, W. Harney Wilson and *Oglesby W. Young* for applicants and petitioners.

Lloyd A. Combs, Dale T. Crabtree, Samuel R. Delisi, William M. Dunegan, John L. Green, Richard H. Kraushaar, Robert K. Little, Hollis Menow, Milton A. Mowat, Harold A. Ross, Richard W. Sabin, Robert W. Skirvin, Edgar E. Smith, Lofton L. Tatum, Robert Y. Thornton, Homra C. Watson, Milton A. White and *Henry M. Wick, Jr.*, for protestants and interveners.

REPORT OF THE COMMISSION
DIVISION 3, COMMISSIONERS TUGGLE, DEASON, AND STAFFORD

STAFFORD, *Commissioner:*

Exceptions to the hearing examiner's report and recommended order have been filed jointly by the Spokane, Portland and Seattle Railway Company (SP&S) and the Union Pacific Railroad Company (UP), separately by UP, the Southern Pacific Company (SP) and the Brotherhood of Locomotive Engineers (BLE). Replies to exceptions were filed by SP&S and UP (joint applicants), SP, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), the Port of Portland (the Port), and the Public Utility Commissioner of Oregon (Oregon Commission). The applicants request oral argument. However, in our opinion the issues herein can be disposed of without hearing the parties orally and the applicants' request is denied. Our conclusions herein differ from those of the hearing examiner.

In the title proceeding, Finance Docket No. 24679, the joint applicants on July 25, 1967, sought authority under section 5(2) of the Interstate Commerce Act to acquire control of the Peninsula Terminal Company (Peninsula) through

the purchase of its entire capital stock in equal shares. By petition filed August 23, 1967, Milwaukee, under section 5(2)(d) of the act, seeks inclusion in the transaction for authority (1) to purchase one-third of the capital stock of Peninsula from its present owner upon the same terms and for the same per-share consideration as the joint applicants; (2) to pay one-third of the purchase price of two diesel locomotives sold Peninsula by the latter's present owner; and (3) to acquire trackage rights over tracks owned jointly by the joint applicants and connecting SP&S with Peninsula. By petition filed November 2, 1967, and amended petition filed November 29, 1967, SP seeks inclusion in the transaction (1) as an equal joint owner of Peninsula; (2) as a condition to such joint ownership to acquire trackage rights over UP's main line between the UP-SP track connection in UP's East Portland Yard (the present Portland terminus of SP) and Peninsula in North Portland, via UP's Albina Yard, St. John's Junction, the UP tunnel, Peninsula Junction and the UP connection with Peninsula, approximately 6.75 miles, all in East Portland, Oreg.; and (3) in the event the joint applicants decline to acquire ownership of Peninsula subject to SP's inclusion, for an order pursuant to section 3(5) of the act authorizing common use by SP and the UP track referred to in (2).

In Finance Docket No. 24890, by application filed December 21, 1967, SP seeks authority under section 3(5) of the act, for common use of the terminal facilities of Peninsula and bridge traffic rights over the line of UP described above between Peninsula and the UP-SP track connection in East Portland Yard.

In Finance Docket No. 24891, by application also filed December 21, 1967, SP seeks authority under section 3(5) of the act for common use of the terminal facilities of UP

between Peninsula and the UP-SP connection in East Portland Yard. The joint applicants, Milwaukee, SP and Peninsula are common carriers by railroad subject to regulation under the provisions of part I of the act.

THE PARTIES

A detailed description of the railroad parties to these proceedings, their operations in the Portland area and their positions with respect to the applications and petitions involved herein are set out in excerpts from the hearing examiner's report appended hereto. These excerpts, to the extent they describe the common carriers involved in these proceedings, are adopted as our own and a detailed description of the railroad parties will not be set out here except as follows for clarity of discussion.

Peninsula.—This carrier was incorporated in Oregon on June 5, 1918. It operates approximately 3.79 miles of terminal switching railroad in East Portland, serving 14 industries, pursuant to authority granted in *Peninsula Term. Co. Operation,* 166 I.C.C. 597. Ownership of the entire 1,500 shares of its outstanding capital stock by its present owner, United Stockyards Corporation (United) was authorized on March 9, 1943, in *Stockyards Ry. Co. Control,* 254 I.C.C. 207.

The interest of the Port, SP and Milwaukee in the purchase of Peninsula's control by SP&S and UP is based on the fact that at the western end of Peninsula's trackage is the Rivergate Industrial District (Rivergate), consisting of about 2,942 acres of land owned, and under development, by the Port at the junction of the Columbia and Willamette Rivers, generally north of and adjacent to the corporate limits of Portland, Oreg. Rivergate has about 6 miles of

waterfront on the 40-foot navigation channels of the two rivers. Much of the Rivergate land is unoccuppied and has yet to be reclaimed. According to the Port, about 500 acres are filled to usable grade and another 300 are now undergoing filling by a pipeline dredge.

The Port's consultants, in an 18-month's study of the area in which Rivergate is located recommended, among other things, that a Rivergate rail system be constructed to connect with rail trunklines. Two alternate rail access routes to Rivergate include a route over existing tracks of the Port which connect with tracks jointly owned by the joint applicants entering Rivergate from the southwest and another route based upon the possible construction on the eastern side of Rivergate of an SP&S main-line extension or an extension of Peninsula's tracks into the area.

Six industries now occupy about 265 acres, or slightly less than one-tenth of the Rivergate area. On the west, or Willamette River, side of Rivergate are a chemical lime plant, occupying 30 acres; an aluminum foundry, 20 acres; an area packaging plant, 25 acres; an integrated steel mill, 150 acres; and since the closing of the record herein, a waterways terminal. The remaining industry is the pole-yard of the Crown Zellerbach Corporation (Zellerbach) located on the east, or Columbia River, side of Rivergate. Of the foregoing Rivergate industries, only Zellerbach is now served by Peninsula. It is served by means of its own industrial trackage, which connects with Peninsula's track. The remaining 13 industries served by Peninsula are located on, or adjacent to, its main and side tracks on the land which Peninsula occupies.

SP&S.—This joint applicant was incorporated on August 23, 1905, in the State of Washington. Its present name was adopted on February 1, 1908. It owns and operates a line

of railroad in Oregon and Washington. Its entire 400,000 shares of capital stock are held equally by the Great Northern Railway Company and the Northern Pacific Railroad (NP). It is presently involved with its parent carriers and another of their subsidiaries, the Chicago, Burlington & Quincy Railroad Company, in a consolidation of their respective systems. This consolidation has been approved and authorized by the Commission and is undergoing review by the United States Supreme Court. See *Great-Northern Pac. —Merger—Great Northern* 331 I.C.C. 228 and 331 I.C.C. 869 (*Northern Lines* case.)

As a condition to consummating the consolidation, the parties thereto are required by condition No. 24 of appendix L to the *Northern Lines* case (see footnote 5, infra) to provide access, to Milwaukee, via trackage rights, to the city of Portland, which has not heretofore been served by Milwaukee.

UP.—The other joint applicant owns and operates over 9,500 miles of track in the States of California, Colorado, Idaho, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, Washington, and Wyoming. Its outstanding capital stock is widely diversified and it is not controlled by any other carrier.

SP.—This carrier is a Delaware corporation owning and operating a line of railroad through the States of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. Like UP, its outstanding stock is widely diversified and it is not controlled by any other carrier.

Milwaukee.—The fifth and last common carrier involved here is a Wisconsin corporation operating a line of railroad in the States of Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Washington, and Wisconsin. Its principal transcontinental line extends from Chicago to Longview,

Wash., a point on the lower Columbia River 46-rail miles north of Portland. As previously stated, it will obtain access to the latter point, for the first time, via trackage rights granted by condition No. 24 in the *Northern Lines* case, upon consummation of the consolidation authorized in that proceeding. It is also presently involved in Finance Docket No. 24182, Chicago, Milwaukee and North Western Transportation Company — Consolidation — Chicago and North Western Railway Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company. This application has been heard and is pending decision by the Commission.

THE PROPOSED TRANSACTIONS

SP&S and UP.—As recited in the appendix, United is no longer interested in operating Peninsula. It has no preference with respect to purchasers of Peninsula but offered the property to SP&S as one of the railroads connecting physically with Peninsula. SP&S communicated United's offer to UP, the other physical connection. The two connecting railroads now propose to purchase, in equal shares, all of Peninsula's outstanding stock from United for $299,405 in cash, adjusted to reflect changes in value of Peninsula's property occurring between February 28, 1967, the date of the purchase contract, and the closing date of the transaction,[2] plus the sum of $70,000 to reimburse United for two switch engines it sold to Peninsula.

Milwaukee.—As indicated above and in the appendix, Milwaukee presently performs no physical operations to

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2. The closing date of the transaction will be no later than the first day of the month following our approval of the purchase of Peninsula and the acceptance by the parties of any conditions we may impose in connection therewith.

and from Portland. However, with its entrance into that point authorized as an incident to consummation of the *Northern Lines* case, and upon its inclusion in this transaction, it plans to serve all the industries on Peninsula's tracks with no absorption of switching charges. Contingent upon the extension of its operations to Portland pursuant to the *Northern Lines* case, Milwaukee requests joint and equal ownership of Peninsula's stock with the other trunk-lines and considers joint ownership of Peninsula essential to its Portland operations insofar as the industries located on Peninsula and in Rivergate are concerned.

Milwaukee asserts that if its petition for inclusion is denied and the *Northern Lines* consolidation is consummated, its traffic to North Portland would move to Guild's Lake Yard, about 6 miles south of North Portland. The traffic would then be switched back to North Portland. This back movement, according to Milwaukee, would require an extra day in transit and be to Milwaukee's competitive disadvantage because the joint applicants, by virtue of their ownership of Peninsula, could fix Milwaukee's switching charges and direct operation of Peninsula to meet their own operating requirements rather than those of Milwaukee.

UP contends, in effect, that we lack jurisdiction to grant Milwaukee's petition for inclusion inasmuch as (1) Milwaukee is not a railroad "in the territory involved" within the meaning of section 5(2)(d) of the act;[3] (2) Milwaukee will

3. Section 5(2)(d) of the act provides that:

The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

be unable to serve the Portland terminal area, even though the *Northern Lines* case is consummated, without further authority under sections 1(18) and 5(2) of the act; and (3) the tracks connecting Peninsula and SP&S are jointly owned by UP, SP&S and NP, therefore, since condition No. 24 of the *Northern Lines* case is not applicable to UP and since joint use of this track cannot be granted over UP's objections in these proceedings, Milwaukee would be unable to reach Peninsula. UP and SP&S contend that Milwaukee's joint ownership of Peninsula would be contrary to the public interest and UP alleges that such joint ownership and control would lead to cumbersome, confused and divided management and thus, would not be in the public interest.

BLE and other labor organizations oppose the Milwaukee petition because, if granted, it would reduce employment at other yards in Portland by eliminating switching and interchange operations.

SP.—As previously stated, SP requests a condition to approval of the SP&S-UP application providing for its inclusion as an equal joint partner in the ownership of Peninsula and as a condition to such ownership, trackage rights over UP's main line and the terminal trackage between Peninsula and the SP&S-UP track connection at East Portland. SP asks that it be authorized to use the UP trackage under section 3(5) of the act in the event either or both of the joint applicants decline to participate in the acquisition of Peninsula subject to the conditions SP requests.[4]

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4. Section 3(5) of the act provides, in part, that:
If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal

Also because of the permissive nature of our authorizations under section 5(2), SP filed its applications in the two embraced cases to assure common use of the terminal facilities of Peninsula and UP's terminal facilities between Peninsula and the SP-UP connection at East Portland and bridge traffic rights over UP's line between Peninsula's line and the connection between SP and UP, even though the joint applicants refused to consummate any authorization of their purchase of Peninsula.

Under its proposals, SP alleges that faster service to Peninsula's industries can be offered through its service and that it anticipates no operating difficulties or labor complications in connection with its proposals. It argues that Rivergate is unique in that it includes several thousand acres of publicly owned industrial land that depends upon the flexibility of rail service for successful development.

As in the case of Milwaukee's proposal, UP opposes SP's petition on the grounds that SP like Milwaukee is not a railroad "in the territory involved;" the management of Peninsula would become difficult and indecisive with four owners; and that ownership by the joint applicants would assure keeping the size of Peninsula's yard facilities and the cost of its operation at a minimum. UP opposes the operation by SP through UP's Albina Yard, that would result from the bridge trackage rights requested by SP,

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facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. • • •

because of the congestion it would create. It asserts that SP operation in the yard would result in uneconomical and wasteful conditions there and that operation of SP trains through Albina Yard is not practical because of the large number of trains already moving through the yard.

The labor organizations appearing in the proceeding oppose SP on the same grounds they oppose Milwaukee; the loss of jobs that would ensue from the petitioners' proposals.

Interveners.—The petitions and applications of Milwaukee and SP are supported by the Port, the Portland Commission of Public Docks, city of Portland and the Oregon Commission. The positions of these interveners are set forth in the excerpts from the hearing examiner's report appended hereto and need not be repeated here.

SP and Milwaukee, particularly the former, are also supported by Zellerbach, the Oregon Steel Mills and Collier Carbon & Chemical Corporation, all industries located, or preparing to locate, in Rivergate. Excerpts from the hearing examiner's report containing a discussion of their positions are also included in the attached appendix. The excerpts describing public agency and shipper interveners' positions are appended for information purposes only. The positions they reflect are not to be understood as having been adopted by us. Williamette Wood Products, Inc., Morrison Oil Company and Serendip Industrial Materials of Portland, Oreg., support the application of the joint applicants.

Hearing Examiner's Recommendations

In the title proceeding, generally, the hearing examiner recommends approval of the sale of Peninsula's stock control to SP&S, UP, and SP in equal shares, subject to sale by each of a one-twelfth interest to Milwaukee upon con-

summation of the *Northern Lines* case and the filing by Milwaukee of an application under section 1(18) of the act for authority to operate between Longview Junction and Portland. He would also grant the joint use authority requested by SP under section 3(5) of the act.

In the embraced proceedings, the hearing examiner would grant the applications of SP under section 3(5) of the act.

For the protection of railway employees, the hearing examiner recommends imposition of the conditions originally prescribed in *Chicago & N. W. Ry. Co. Merger,* 261 I.C.C. 672, 675 *(North Western* conditions), which provide that:

> During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.***

EXCEPTIONS TO HEARING EXAMINER'S REPORT

The parties filing exceptions to the hearing examiner's recommendations continue to press, on exceptions, the same general positions they adopted at the outset of these proceedings.

Exceptions of SP&S and UP.—The joint applicants contend that SP and Milwaukee are not "railroads within the territory involved" and that even if the *Northern Lines* case is consummated, Milwaukee, under the terms of condition No. 24(a) of appendix L to the *Northern Lines* case, and under the decision of the United States Supreme Court

in *Texas & Pac. Ry. v. Gulf, Etc.*, 270 U.S. 266 (1926), would be unable to serve Peninsula and the Portland area without first securing a certificate of public convenience and necessity permitting an extension of its line of railroad to Portland under section 1(18) of the act.[5] They contend that undue emphasis is placed on the future development of Rivergate and that the hearing examiner erroneously holds the Portland terminal area to constitute one terminal entity. They argue that the evidence does not support a four-way ownership of Peninsula, either from a general public or a shipper standpoint, and that common use by SP of the Peninsula and joint-applicant facilities is not in the public interest.

The replies of SP, Milwaukee, the Port and the Oregon Commission to the exceptions of the joint applicants are, like those exceptions, mostly reflections of the repliants positions from the outset of the proceedings and agree generally with the findings of the hearing examiner with respect to the petitions and applications of SP and Milwaukee.

Exceptions of SP.—The exceptions of SP are taken to details in the hearing examiner's findings relating to compensation for the use by SP of UP interchange trackage and access by SP over intervening UP trackage. The joint applicants, in reply, take a contrary view to the points raised by SP.

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5. Condition No. 24, and subparagraph (a) thereof, state:

24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission.

(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo [the consolidated carrier resulting from consummation of the Northern Lines case] between Longview Junction,

(footnote continued on next page)

Exceptions of BLE.—On exceptions, BLE reiterated its support for the acquisition of Peninsula by the joint applicants, which it considers to be in the public interest, and its objection to the petitions and applications of Milwaukee and SP. It also objects to the so-called *North Western* conditions recommended by the hearing examiner for the protection of employees and requests the imposition of "attrition" conditions similar to those imposed in the *Northern Lines* case.[6] If we consider that this case does not merit full attrition conditions, BLE requests the imposition of the so-called *New Orleans* conditions as prescribed in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271.

Whichever conditions are imposed, the BLE alleges that they should be extended to protect the employees of North Portland Terminal Company if the petitions and applications of Milwaukee and SP are granted since such grants would permit SP, in particular, to bypass North Portland terminal in serving Peninsula industries, to the detriment of the North Portland employees.

(footnote 5 continued)

Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree, or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers;

6. In previous reports, "attrition" has been held to mean that "no reduction in force of employees shall occur other than principally by death, retirement, discharge for cause or resignation." For simplicity, the phrases "attrition conditions," "attrition protection," or "attrition agreement" are used in Commission reports to reflect this concept. See *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.,* 328 I.C.C. 684, 715.

In reply to BLE's exceptions, the joint applicants allege that if they are authorized to acquire control of Peninsula, there will be little change in the operation of that carrier. Consequently, there will be little or no effect on railway employees and the *North Western* conditions recommended by the hearing examiner will afford sufficient protection to the employees.

Discussion and Conclusions

Title proceeding.—The record establishes that the purchase of Peninsula by SP&S and UP will be in the public interest. The joint applicants now connect with Peninsula and the present service by Peninsula to its industries will be unaffected by the substitution of joint applicant's control for that of United. Furthermore, it will be in the public interest for control of Peninsula to pass from the noncarrier, which no longer desires it, to carrier auspices and on this record the most logical owners would be Peninsula's connecting carriers. It does not appear from the record, nor does any party contend, that the purchase price for Peninsula, arrived at by the parties through arm's length bargaining, is unreasonable or that it would jeopardize the financial structure of the joint applicants. After due consideration we can find no reason for withholding approval of our authority for the purchase. However, no stock or securities are to be issued or any obligation or liability assumed in connection with such purchase without our prior approval under section 20a of the act.

Jurisdiction over petitions for inclusion.—We do not agree with the joint applicants' contention that because SP and Milwaukee do not physically connect with Peninsula, they are not "railroads in the territory involved" within the meaning of section 5(2)(d), and, therefore, that we lack

jurisdiction to require their inclusion in the title proceeding.[7] Our authority to require inclusion of another carrier in cases of this nature does not arise primarily from section 5(2)(d). Instead it arises from the power conferred upon us by section 5(2)(b) to impose terms, conditions and modifications to our section 5(2) authorizations.[8] The only test required by section 5(2)(b) of terms, conditions, and modifications is that they be just and reasonable. See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304, 326.

Section 5(2)(d) does not limit our conditioning power under section 5(2)(b) with respect to other railroads. It merely requires us to give weight to the petitions of "other railroads in the territory involved" and to include such other railroads in a transaction if the public interest for such inclusion is shown. Cf. *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. 780, 787-788. Accordingly, we may require the inclusion of SP and Milwaukee in the title proceeding, if we find such inclusion to be just and reasonable, i.e., in the public interest, regardless of whether either or both of the petitioners can meet the joint applicants' technical definition of a railroad or "railroads in the territory involved." Of course, the lack of any

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7. See footnote 3 regarding section 5(2)(d) of the act.

8. Section 5(2)(b) provides that

> Whenever a transaction is proposed under sub-paragraph (a) [to section 5(2)], the carrier or carriers or person seeking authority therefor shall present an application to the Commission, • • •. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.

physical connection is a factor for consideration in determining whether a condition requiring inclusion is just and reasonable.

We also disagree with the joint applicants' contention that without a certificate of convenience and necessity under section 1(18) of the act for an extension of its line of railroad to Portland, Milwaukee cannot be included in this proceeding.

Condition No. 24(a) to the *Northern Lines* case[9] grants Milwaukee the right to acquire trackage rights over Northern Lines track between Longview Junction, Wash., and Portland, Oreg., provided, of course, the consolidation authorized in the *Northern Lines* case is consummated. A certificate under section 1(18) of the act is necessary before a carrier can legally extend its operations over trackage not theretofore operated in interstate and foreign commerce. However, if the trackage is already operated in interstate commerce (in effect, it is already certificated), only section 5(2) authority is required. The lessee under a trackage rights agreement in such case merely succeeds to the right to operate the line, within the limits of the trackage rights contract, of the lessor railroad. See *International —G. N. R. Co. Trustee Trackage Rights,* 275 I.C.C. 27, 33.

The joint applicants are misinterpreting condition No. 24(a) by arguing that it requires applications (both of which, of course, would be subject to protests) under section 1(18) and section 5(2) before Milwaukee can extend its lines via *Northern Lines* trackage into Portland. As used in the condition, the language "Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg.," is only intended to emphasize the fact that Milwaukee is, in the

9. See footnote 5.

Northern Lines case, accorded access for the first time to Portland. The Commission did not intend, and did not state in condition No. 24, that Milwaukee must first seek approval under section 1(18) of the act for an extension of its line of railroad over *Northern Lines* trackage before it could request authority under section 5(2) to acquire the trackage rights necessary for its entry into Portland. The question of whether a certificate of public convenience and necessity under section 1(18) is necessary before railroad service can be extended by trackage rights over the line of another carrier was decided in the negative by the Commission over 20 years ago in *Chicago, B. & Q. R. Co. Control,* 271 I.C.C. 63, 66-67, and we can find nothing in the *Northern Lines* case to indicate that the Commission intended to reverse that longstanding precedent.

The decision in *Texas & Pac. Ry. v. Gulf, etc. Ry., supra,* cited by joint applicants in support of their section 1(18) argument was, of course, decided prior to the enactment of the Transportation Act of 1940, placing the regulation of trackage rights acquisitions under the provisions of section 5(2) of the act instead of under section 1(18) where such regulation had previously been vested. Accordingly, the cited proceeding is inapplicable to the situation here.

We are satisfied, and we so find, that it is within our jurisdiction to determine whether, on this record, SP and Milwaukee should be included within the transaction.

Merits of petitions for inclusion.—Though we possess the necessary jurisdiction to require inclusion of Milwaukee and SP in a four-railroad control of Peninsula and to authorize the common use of terminals and facilities requested by SP, such control must meet the public interest requirement before any condition we might impose in these respects can be found just and reasonable.

With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24.[10]

10. Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of condition No. 24, if any, to Peninsula's tracks which would at that time be partially owned by the Northern Lines.

The hearing examiner concluded that the entire Portland territory is an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity. He felt that "divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area." Therefore, he based his recommendations upon consideration of the involved area as a whole.

We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within that undefined geographical area. Cf. *Nashville, C. & St. L. Ry. Construction,* 295 I.C.C. 363, 377. If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads. The resulting situation could well give rise to more problems and litigation and be more disruptive of growth and development of the area than the "divisive determinations" frowned upon by the hearing examiner. Therefore, we do not agree with his conclusion in this regard and for that reason we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor.

Confining our consideration of the terminal area involved to Peninsula, we find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory. In the past, the Commission has usually held that sound

economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic and is generally also followed in proceedings involving motor carriers. See *Minneapolis, St. P. & S. S. M. R. Co. Acquisition*, 295 I.C.C. 787, 802, and cases cited therein.

As shown in the appendix, SP shared, through connections and use of joint rates and routes, in only about 20 percent of Peninsula's traffic during 1966, and only about 17 percent during 1967. Milwaukee's share, also via connections and joint rates and routes, amounted to only 1 percent during those years. Permitting SP and Milwaukee to acquire access to, and equal ownership of, Peninsula and therefore participate in its existing traffic on a direct haul basis will, of course, allow those two railroads to increase their share of Peninsula's declining traffic (3,640 loaded cars handled in 1966 and 2,748 handled in 1967). These increased shares of SP and Milwaukee could only be at the expense of the joint applicants and the railway employees whose jobs would be eliminated by the direct service planned by SP and Milwaukee.

Only three of the 13 shippers located on Peninsula's line participated in these proceedings and they support the joint applicants. Two of these three desire present service to continue. Three shippers, all located in Rivergate, support SP. At the time of the hearing, only one, Zellerbach, was in actual operation and it does not oppose the joint applicants. Its interest appears to be in obtaining the maximum

amount of direct service in order to increase its car supply. It also believes that four-way control of Peninsula would result in the elimination of a 22-degree curve in Peninsula's line thereby permitting the use of longer cars than are presently used for its poles. Its complaint with regard to present service is that 64 percent of its pole shipments during the period between December 1, 1966 and November 30, 1967, incurred an average delay of 4.5 days each because of car shortages. The joint applicants reply that the drop-end gondola cars, supplied by the railroads for the movement of Zellerbach's poles, are special purpose cars, not always immediately available. The record does not warrant a finding that car supply to Zellerbach under four-railroad control would be increased or that there would be any greater likelihood of track realignment.

The steel mill supporting SP was in the process of construction at the time of the hearing. According to the record, it appears to have been located in Rivergate in order to take advantage of the available water transportation. Although it is interested in developing an ore field near SP's line in California, its Rivergate plant was constructed in an area where the round trip unit-train SP service, for which it states a preference, cannot be instituted without major fill and track construction. The record does not establish that under four-railroad control, the other three carriers would be willing for Peninsula to incur the expense of new construction for the sole benefit of SP. Likewise, the record fails to establish that the steel mill would not develop the California ore field if SP's unit-train service were unavailable because of the joint applicants' control of Peninsula.

The third shipper supporting SP is the chemical company, also under construction in Rivergate at the time of

the hearing. The record shows it was located in Rivergate through the efforts of SP&S. It also intends to utilize water transportation for its inbound raw materials and water, truck, and rail for its outbound product. Its support of SP is apparently based on the general supposition that the more rail service it has into its plant, the better such service will be. It offered no particulars as to the superiority of SP service and does not contend that its operations will in any way be hampered if direct SP service is not received. In our opinion, and we so find, the evidence offered by the three shippers supporting SP's position, as well as the evidence offered by the petitioners themselves, fails to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically.

We have thoroughly considered the briefs and replies to exceptions filed by the public agencies participating in these proceedings. Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate. However, this objective, if achieved at the expense of the joint applicants as proposed in the instant proceedings, would be directly contrary to the precept of the Congress, embodied in its national transportation policy, to foster sound economic conditions in the transportation industry. The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership. We cannot find, therefore, that inclusion of SP and Milwaukee in the title proceeding would constitute a just and reasonable term, condition, or modification of the authority requested by the joint applicants.

Common use applications under section 3(5).—The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern,* 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities,* 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location.[11] In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use.

Since we find that the common use authorizations requested by SP under section 3(5) of the act should not be authorized for the reasons stated above, we need not reach the questions of whether common use of the facilities involved would be practicable or would substantially impair the ability of Peninsula and UP to handle their own business. Other contentions of the parties as to fact or law, both with respect to the title proceeding and the common use applications of SP, not specifically discussed herein have been given consideration and found to be without material significance or not justified.

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11. This case was cited by SP in support of an allegation that an invasion of territory may be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation.

Traffic conditions.—Although we find herein that joint control of Peninsula by SP&S and UP, through purchase of its capital stock, is in the public interest, Peninsula's present routings and interchanges should be maintained unchanged by the joint applicants. SP&S suggests that for this purpose it is willing to accept imposition of the so-called standard traffic conditions prescribed in *Detroit, T. & I. R. Co. Control,* 275 I.C.C. 455, 492. We believe that with some modification, these conditions will adequately serve their intended purpose in this case. Therefore, to protect the present routings and interchanges, our order herein will impose, by reference, the following traffic conditions:

1. Under the control of SP&S and UP, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission;

2. The present neutrality of handling inbound and outbound traffic to and from Peninsula by SP&S and UP shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through SP&S and UP without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise;

3. The present traffic and operating relationships existing between Peninsula, on the one hand, and, all lines reaching Peninsula through the lines of SP&S and UP, on the other, shall be continued insofar as such matters are within the control of SP&S and UP;

4. Peninsula, SP&S and/or UP shall accept, handle, and deliver all cars inbound, loaded and empty, without discrimination in promptness or frequency of service irrespective of destination or route of movement;

5. Peninsula, SP&S and/or UP shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways;

6. Peninsula, SP&S and/or UP shall refrain from closing any existing route or channel of trade with SP or Milwaukee on account of the transaction authorized in Finance Docket No. 24679, unless and until authorized by this Commission;

7. Consummation of the transaction authorized in Finance Docket No. 24679, shall constitute assent by the corporate parents of SP&S, the members of their respective systems, and any carrier resulting from consummation of the Northern Lines case, to be bound by these conditions to the same extent that SP&S is bound by these conditions; and

8. Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

Employee conditions.—The so-called *North Western* conditions recommended by the hearing examiner for the protection of railway employees are obsolete for transactions such as this and have not been imposed by the Commission for several years due to the uncertain protection they afford. In our opinion they are inadequate to protect the employees in this proceeding. It is our opinion, also, that the purchase of Peninsula's control by SP&S and UP will not affect employees to the extent that the attrition

conditions agreed upon by the carriers and employees in the *Northern Lines* case, and requested here by BLE, would be merited.

Instead, we believe that the *New Orleans* conditions, requested in the alternative by BLE, will provide sufficient protection and our order herein will impose, by reference, the conditions prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, for the benefit of railway employees of the joint applicants and Peninsula adversely affected by this transaction, subject, however, to the following arbitration provision in lieu of those now in the New Orleans conditions:

In the event any dispute arises with respect to the protection afforded by these conditions or with respect to their interpretation, application or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final,

binding and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

Inasmuch as the BLE's request for conditions to protect the North Portland Terminal employees is based on the contingency that SP and Milwaukee will participate in Peninsula's control, and since that contingency is precluded by our denial of the petitions and applications of those two carriers, there is no need to deal further with the matter, and the contingent request for the protective conditions is denied. Moreover there is no indication that the said employees come within the protective purview of section 5(2)(f).

Ultimate Findings

The acquisition by the joint applicants of control of Peninsula does not involve any guaranty or assumption of the payment of dividends or fixed charges and will not result in any increase in total fixed charges. The petitions of SP and Milwaukee for inclusion therein have been considered and disposed of and no other railroad seeks to be included. Adequate transportation service to the public will not be affected and railway employees will be protected by the imposition of the conditions we have provided in their behalf.

Accordingly, we find in Finance Docket No. 24679 that, subject to the conditions imposed herein for the protection of railway employees and traffic, the acquisition by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company of control of the Peninsula Terminal Company through the purchase of its entire capital stock in equal shares, as described herein, is a transaction within the scope of section 5(2) of the Interstate

Commerce Act, that the terms and conditions thereof are just and reasonable, that the transaction will be consistent with the public interest, and that the inclusion in the transaction of the Southern Pacific Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is not, for the reasons discussed herein, consistent with the public interest.

We further find in Finance Dockets Nos. 24890 and 24891, that the common use by the Southern Pacific Company of the terminal facilities of the Peninsula Terminal Company and a line of railroad of the Union Pacific Railroad Company and bridge traffic rights over the latter line, all as described herein, is not in the public interest.

An appropriate order will be entered.

APPENDIX

Excerpts from the report of the hearing examiner

* * * * * * *

Peninsula is a terminal railroad Oregon corporation subject to part I of the Interstate Commerce Act engaged in switching operations at North Portland, Oreg. North Portland is within the Portland switching district. Portland is a major deep channel seaport, transportation, and distribution center serving the Pacific Northwest and the Continental United States. The western end of Peninsula's main line extends to a Crown Zellerbach pole yard * * * at the eastern tip of Rivergate Industrial District (Rivergate) * * * affording potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings. Peninsula owns no tracks within Rivergate. It serves the pole yard by using industrial tracks of Zellerbach there. Peninsula was established as an essential for operation of Portland

Union Stockyards * * * to facilitate handling livestock, and to provide a rail connection between the stockyards and trunkline railroads serving the Portland area. * * * Swift & Company presently processes only agricultural chemicals, hides, and wool at North Portland and the volume of that activity is expected to decline. Crown Zellerbach Corporation (Zellerbach) recently acquired the North Portland Swift property and expects to establish a 200,000-square foot warehouse and an ink manufacturing factory there. Zellerbach also has its Flexible Packaging Division plant at North Portland and operates the above-described pole yard at the west end of the Peninsula line in the Rivergate area. Peninsula serves 13 industries on its line other than the stockyard. * * * Peninsula has become less important to Portland Stockyards and * * * [United Stockyards Corporation (United), Peninsula's present owner] has no interest in operating a railroad independent of stockyard operations. It therefore proposes to sell all of the stock in Peninsula at a reasonable price established through a 1962 appraisal by American Appraisal Company and has no preference as to the purchaser. * * * The agreed purchase price of Peninsula under a contract of purchase dated February 28, 1967, between United and SP&S and UP is a total of $299,405 for all outstanding shares of common stock of Peninsula plus a sum of $70,000 to reimburse United for two switch engines sold by United to Peninsula representing an unsecured account payable to United. Settlement to be made by checks of purchasers upon approval of the transaction. The appraisal was based on empty land, plus local costs of roadway and structures, less depreciation. Adjustment of the appraisal, at the time of contract of sale was made only as to rolling stock, working capital, and miscellaneous betterments. The president of Peninsula represents that the contract price is fair and reasonable.

Peninsula properties consist of 13.17 acres of land, none suitable for industrial development, 15,559 feet of main-line track plus spurs and sidings or a total of 3.79 miles of main-line and secondary and spur track laid on treated ties in sand with no rock ballast. The distance from one end of the line to the other is about 8,000 feet with a 5-foot elevation to its eastern end. The above-noted two locomotives owned by Peninsula consist of a 50-ton G.E. electric, and the other, a 70-ton Copper Bessimer electric, including tools and parts for operation and maintenance. Tools for track maintenance, a conveyance for workmen, a heated enginehouse for both locomotives, a yard office (14 feet by 23 feet 6 inches in size), and a sand house (11 feet by 18 feet in size) are also owned.

* * * * * * * *

Peninsula receives cars directly from and delivers cars to SP&S, NP, UP, and Great Northern Railway Company (GN) (empty and loaded) at North Portland, which total [from 10 to 20] * * * cars daily handled through the North Portland Freight Station with an office located at the Portland Stockyards. The cars move to or from double main-line tracks jointly owned by SP&S and NP, extending from Vancouver, Wash., south across the Columbia River, through North Portland and across the peninsula at the junction of the Columbia and Willamette Rivers (the peninsula) to SP&S Doan Street Yard and the Portland Terminal Company's Guild's Lake Yard. At North Portland there is, among other things, a head block on the SP&S-UP tracks and a 259.5-foot track extending therefrom to four North Portland interchange tracks * * * [3 of] which accommodate from 30 to 35 cars each. One is used by Peninsula for receipt of cars from the trunklines. The second is used by Union Pacific to receive cars from Peninsula, GN, NP, and SP&S. The third is used by SP&S, NP,

and GN to receive cars from Peninsula and UP, and the fourth is an open or running track. Two of the interchange tracks are owned, one-half by Peninsula, and one-half jointly by UP, SP&S, and NP. The other two tracks are owned jointly by UP, SP&S and NP. The interchange tracks connect directly with Peninsula's main-line track to the north and also with a single-line track of [the Oregon-Washington Railroad & Navigation Company] (OWR&N), • • • [a wholly owned UP subsidiary], extending about 1.7 miles southerly across tracks of UP to Peninsula Junction, and thence about 2.6 miles through a tunnel near St. Johns Junction to Albina Yard. The interchange tracks are used by Peninsula, UP, NP, and SP&S as joint owners, and by GN under a contractual arrangement. The use includes interchanges between the four trunklines and also between those lines and Peninsula. • • • Service at North Portland is provided through a joint local freight agent of the trunklines who informs Peninsula of industry service requested as to outbound moves. The agent prepares the inbound interchange reports and Peninsula the outbound interchange reports. Outbound bills of lading of the four trunklines are signed by the joint agent. Expenses of maintaining the North Portland station are prorated among the four lines by car count, loaded and empty, with the joint-facility invoice prepared by the operating road, UP or SP&S. The joint agent recommends no routings for shippers and receives no open-route car orders. Usually there are four deliveries and two pickups daily of cars moving to or from Peninsula by SP&S or UP. Cars from Peninsula could move by UP to the pass near Peninsula Junction, to Kenton Yard (about 2.6 miles southeast of Peninsula Junction) or to Albina Yard. Cars picked up from Peninsula by SP&S usually move to Vancouver. In addition to the

above-described North Portland Freight Station, there is a yard office at the eastern end of the interchange tracks. The yard office is maintained jointly by SP&S and UP under terms of a 1912 agreement which established the North Portland Freight Station. Four clerks at the yard office are UP employees and four clerks at the North Portland Freight Station are SP&S employees.

Peninsula also provides local intraplant and interterminal service. It has established local switching tariff No. 23, effective September 23, 1965 (not applicable to rail line-haul service), which among other things provides a $22.44 per-car charge for each car movement and service charges for the handling of livestock. No other switching tariff is published by it. Peninsula solicits no traffic and traces no shipments moving beyond its line. Revenue from its connecting rail carrier service is derived from a division of revenue, billed and collected by the trunkline, generally amounting to $29.25 a car when the car revenue exceeds $60. The agreed rate divisions were established by Joint Division Sheet 8-R issued by North Pacific Coast Freight Bureau, Seattle, Wash., effective July 1, 1964. Usually the line-haul carriers absorb the division charges. Its locomotives and crews operate two 8-hour shifts each day of the week, one from 9 a.m. to 5 p.m. and the other from 9 p.m. to 5 a.m. Light repairs of roadbed and equipment are made by regular Peninsula employees and heavy repairs by part-time employees. Since January 1, 1968, by agreement with Portland Livestock, Peninsula employees load and unload livestock.

Basic labor agreements were entered into by Peninsula on April 14, 1943, with the Brotherhood of Railroad Trainmen and on June 15, 1941 (since modified), with the Brotherhood of Locomotive Firemen and Engineers. Peninsula engineers are paid $29.05 or $32.68 a day for service ex-

clusive of repairs and maintenance with no holidays. They receive vacation and insurance benefits equivalent to employees of trunkline carriers. Switchmen receive $27.88 a day and the footboard yardmaster $30.21 with seven annual holidays, extra pay for work on holidays, and vacation, insurance and welfare benefits similar to the engineers'.

United has agreed to manage Peninsula after the purchase in accordance with policies of its director, including supervisory, accounting, stenographic and other necessary managerial services as presently provided. United may terminate the agreement on 6 months' notice and the purchasers may terminate it on 30 days' notice.

During 1960, Peninsula handled 4,993 loaded or partially loaded cars compared to. 2,748 cars in 1967. The latter represents about 39 percent of all cars interchanged at North Portland. The other 4,300 cars were interchanged between SP&S, NP, and GN, on the one hand, and, on the other, UP. From 1960 through 1967, there was a decrease in movements of livestock and packinghouse products and an increase in wood products. For example, in 1967, 34 percent of the cars handled transported wood products, 33 percent chemicals, 8 percent livestock, 7 percent packinghouse products, 13 percent paper products, and 5 percent other. In 1960, 16 percent of the cars handled wood products, 8 percent chemicals, 48 percent livestock, 15 percent packinghouse products, 6 percent paper products, and 7 percent other.

The statement of assets and liabilities of Peninsula as of February 1967, reveals total assets $239,716, including current assets $35,038 (cash on hand, $17,365, accounts receivable, $7,888, materials and supplies, $8,669, and prepayments of insurance and other, $1,116), properties—transportation road and equipment, less depreciation,

$196,938, and miscellaneous physical property, $7,740. Its expense and retained income statement for each of the calendar years, 1962 through 1966, and for February 1967, reveals, among other things, total railway operating expenses for February 1967, $14,774 and for 1966, $81,244, total income before fixed charges for February 1967, a minus ($725) and for 1966, $13,320 less miscellaneous rents paid, $1. Rent for leased road equipment for 1966, was $3,200 and for January 1967, $533. The balance of retained income for February 1967, was $7,504 and for 1966, $8,762. At the beginning of 1962, its retained income was $151,208, which by the end of February 1967, was reduced to $7,504, after adding annual income (less losses), and subtracting dividends of $167,556 paid during 1966.

* * * * * * *

SP&S operates over lines generally extending from Spokane through Pasco along the north side of the Columbia River to Vancouver, Wash., thence across the Columbia River through North Portland, thence across the east-west line of UP on the peninsula, and thence across the Willamette River, through Doane Lake Yard and Willbridge, Oreg., to Guild's Lake Yard. The latter connects with Portland Terminal Company tracks in downtown Portland. A connecting track at the intersection of SP&S and UP lines on the peninsula affords access to Barnes Yard. SP&S has trackage rights at Barnes Yard and at Terminal No. 4. UP and SP&S jointly own tracks extending from Barnes yard to the southwestern side of Rivergate which connect there with those of the Port of Portland. The SP&S Vancouver-Willbridge track, constructed in about 1908 with an industrial spur at North Portland, is jointly owned by SP&S and NP. In 1909 * * * [OWR&N] constructed a track connecting Albina with the spur track, and a year later

built a bypass track at the North Portland Junction. The bypass enables operation between Albina and North Portland interchange tracks without entering the SP&S-NP main line. • • • Additionally, SP&S owns Oregon Trunk Railroad extending from Wishram, Wash., a point on the SP&S line, to Bend, Oreg., and also owns Oregon Electric Railway Co., extending south from Portland to Eugene, Oreg. SP&S directly serves industries on its lines and those on lines used jointly by it located on the southwest side of the Willamette River at Portland including industries and docks also served by Portland Terminal Company. It serves industries at East Portland by use of the UP-SP steel bridge across the Willamette River near the Portland Terminal Company's depot and yard. SP&S switches cars to and from points in the East St. Johns and the Terminal No. 4 areas north of the Willamette River and south of Rivergate. SP&S delivers cars daily to the North Portland interchange tracks at 2:30 a.m. and 11 a.m. and picks up cars there at 9:30 a.m. and 6 p.m. UP also picks up and delivers cars there daily at 6:30 a.m. and 2:30 p.m. • • • North Portland line-haul traffic of NP and GN is usually moved twice daily to and from Vancouver. SP&S switches all Vancouver cars including those of UP. SP&S assesses a tariff switching charge for movement of cars to and from Peninsula interchange. • • • SP&S as owner of Peninsula could obtain Peninsula trackage rights which are essential to any agreement for switching operations. Presently Milwaukee could interchange cars with SP&S • • • for movement to the peninsula by payment of a division of the through rate. In the absence of Milwaukee trackage rights there the receiving carrier could designate car delivery points of Milwaukee cars. • • •

SP&S indicates that the extension of Peninsula to serve the Rivergate is uncertain because of heavy curvature, impaired clearances, and low standard tracks of Peninsula,

but alteration will become necessary with growth of the district; that a new direct access track from the SP&S main line at North Portland may be feasible; and that if such a track is constructed SP&S and UP have assured the Port of Portland they would provide service similar to that now available in the southwest part of the district. SP&S has made no decision respecting the planned additional access route to Rivergate. It expects to provide adequate switching service into the area as required.

* * * * * * * *

The SP&S parent companies' ownership is in issue in [the *Northern Lines* case] *** Pursuant to proposals therein, on October 26, 1966, Milwaukee entered into a written agreement with GN, NP, Chicago, Burlington & Quincy Railway, SP&S, and the New Company (The Great Northern Pacific & Burlington Line, Inc.), which as pertinent provides:

> Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, et al., the Milwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:
>
> ***Condition No. 2—Entry into Portland and Trackage Rights between Longview Junction and Portland.***

Provisions of the agreement relating to implementation of condition No. 2 require the New Company or of SP&S, where possible, to grant Milwaukee trackage rights over present NP and SP&S tracks between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of New Company facilities at Portland necessary for the switching of traffic to other railroads and industries. There is no specific reference therein to North Portland, or use of the North Portland interchange tracks.

* * * * * * * *

UP, a class I railroad corporation, operates over trackage extending (1) from Seattle to Portland, (2) from Portland, through O.T. Junction and Hinkle, Oreg., Pocatello, Idaho, and Cheyenne, Wyo., to Omaha, Nebr., (3) from Cheyenne, through Denver, Colo., to Kansas City, Mo., (4) from Spokane, Wash., to Hinkle, (5) from O. T. Junction, Oreg., to Bend, Oreg., and (6) from Pocatello to Los Angeles, Calif. UP connects at Bend with GN. *** UP tracks enter Portland from the east forming a great loop extending from a wye near Troutdale, 14 miles east of the Willamette River at Portland. One track extends from Troutdale generally west parallel with the Columbia River through Kenton Yard, Peninsula Junction, across the SP&S-NP tracks which enter Portland from the north, thence through Barnes Yard to the southwestern side of Rivergate and Terminal No. 4, and returns along the north side of the Willamette River through St. Johns Junction located in Swan Island Industrial Park, through Albina past the entrance of the steel bridge (which affords access to the Portland Terminal Company's yard and depot in downtown Portland) to East Portland (junction with SP), thence generally east through Sullivan Gulch to Troutdale. Track at the west end of the loop near Barnes Yard jointly owned by SP&S connects with Rivergate where UP has served Ash Grove Lime and Cement Company. An OWR&N *** track segment extends from North Portland interchange tracks, through St. Johns Junction, and Albina Yard to East Portland. This *** main track, was mentioned in connection with SP&S tracks. It crosses the western end of the UP loop as does the SP&S-NP tracks west thereof. This segment of track is of particular significance in these proceedings. SP traffic now moves or is expected to move over it. An issue respecting congestion of traffic on the track segment is raised by UP in its opposition to the SP proposals. The distance over the segment from

North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. From the connection of the North Portland interchange tracks with Peninsula over the OWR&N tracks to its intersection with the UP track at Peninsula Junction is about 2.04 miles. At this intersection connections permit switching in four directions. Operation over the turnouts there is limited to 15 miles per hour. Near this intersection UP also has a bypass track which will accommodate about 10 cars. The distance from Peninsula Junction over the segment south through a 1-mile tunnel to St. Johns Junction is about 2.16 miles and the distance beyond St. Johns Junction over the segment to the north end of Albina Yard is 1.02 miles. The track segment generally is level with the exception of the 5/10 of 1-percent grade increase from Albina Yard to the center of the tunnel. There is only one significant highway grade crossing on the segment at Columbia Boulevard which has a flashing light signal. There are also two or three private grade crossings near Peninsula Junction. Between Albina Yard and North Portland there is a 131-pound single-line track laid on rock ballast having no curves which create operating problems. Operation over the segment of track between Peninsula Junction and Albina Yard is presently controlled by a central traffic control system from Albina Yard. Albina Yard is a large and important classification and transfer yard of UP including about 44 tracks which will accommodate from 15 to 20 cars each extending about ¾ of a mile in length. The Williamette River lies along the western side of the yard and a super highway and a bluff lie along its eastern side limiting expansion. However, a map in evidence reveals that the yard at its center is about 500 yards wide and near its south end 666 yards wide. Most UP traffic to or from the Portland area moves through this yard. There is a 400 by 150-foot freight house at the south end of the yard. This is

used in part as a salvage depot by UP and in part by shipper lessees. All of the tracks are used for switching purposes by UP. It endeavors to keep open one or two of the center tracks in the yard to accommodate through traffic. None of the tracks are permanently designated as running tracks although a substantial amount of through traffic moves through the yard. UP operations at Albina Yard are represented as taxed to capacity, with no room for expansion there. Switch engines operate out of there to serve Kenton Yard, North Portland Barnes Yard, East Portland, Sullivan Gulch, and Portland Terminal Company. They move, in addition to freight, passenger trains to and from Portland Station. Two such trains operate each way daily through Sullivan Gulch. Other passenger trains moved by engines from Albina operate out of Portland Station over the SP&S main line through North Portland and not through Albina Yard. Five UP freight trains operate each way daily over the track segment between Albina Yard and North Portland Junction. Delays at North Point Junction interlocker are not uncommon with some delays as long as 80 minutes. SP uses the track between Brooklyn Yard and Albina Yard for freight moving to and from North Portland. The speed of traffic through the interlocker at East Portland is limited to 8 miles an hour. SP proposes to handle cars from Brooklyn to North Portland. UP represents that if the SP applications are granted congestion would occur principally on the single-track segment between St. Johns Junction and Peninsula Junction; that three-fourths of the UP trains arriving at Albina Yard via Kenton are delayed from 15 to 180 minutes because of Albina Yard congestion. Also, there is a 1.2-percent grade on the UP track 1 mile east of East Portland which tends to retard car movements. Usually engines stationed at Kenton Yard are used for switching

between Albina Yard and North Portland. There has been a consolidation of the Kenton Yard and Terminal No. 4 engines to eliminate congestion of traffic. There were about 40 to 56 switching [transfer and train] moves daily in the Peninsula Junction area during 1967. For example, an average of 40 *** [switch transfer or train moves] a day moved between October 1 through October 14, 1967, and an average of 37 *** [switch, transfer or train moves] a day between January 14 through 27, 1967. From January 26 through January 27, and from October 1 through October 14, 1967, traffic clearances in excess of 30 minutes between Albina Yard and North Portland interchange occurred from about 4 to 11 times or an average of 7.5 times daily. There are four transfer SP trains handled daily at Albina Yard. About 6 UP trains move each way in addition to trains of NP, GN, and SP&S over tracks north of North Portland or a total of about 55 trains daily use those tracks. About 30 minutes time should be required to operate a switch engine with a few cars over the cleared track segment between North Portland and Albina Yard. However, an average of about 30 hours has been required for the movement of SP cars and also those of UP between Albina Yard and North Portland. UP does not consider a 30-hour transit time adequate service and has endeavored to reduce the running time by the described consolidation of its Kenton-Terminal No. 4 terminal service, by the establishment of the above-described central traffic control, by breaking trains at Seattle, Dow, Hinkle, and Pocatello to avoid switching at Albina Yard, and by increased operation through Sullivan Gulch.

There is a double track extending from the south end of Albina Yard to East Portland and the junction of the SP there. Even though traffic congestion exists at Albina Yard,

UP nevertheless represents that it can provide Rivergate any service through Peninsula needed and represents that its present service in the involved area meets shippers' demands for service. The steel bridge crossing the Willamette River at East Portland is jointly owned by SP and UP. The bridge, as noted, allows UP and SP to connect with the tracks of the Portland Terminal Company, the Portland Yard, the SP&S Hoyt Street Yard, and the SP&S and NP Guild's Lake Yard, which permits SP to interchange traffic at the latter yard with SP&S or NP. Portland Terminal Company is a terminal switching company owned 40 percent by UP, 40 percent by NP, and 20 percent by SP.

UP, as noted, physically connects with Peninsula at North Portland, an interchange junction point and station on GN, NP, SP&S, and UP, within the Portland switching district. The physical interchange of line-haul traffic moving by UP or its connections is performed by UP. On traffic moving to and from SP via SP&S, NP, GN, and UP from and to industries located on Peninsula, SP absorbs the Peninsula's rate division, and on traffic in which Milwaukee participates through joint routings, no switching charges are passed on to the shipper or consignee. UP expects to continue its policy of permitting line-haul carriers having no physical interchange with Peninsula to reach, through existing joint rates and routes, industries on the latter's line.

At the request of the Port and the Commissioner of Public Docks, a railroad conference was held at Portland on June 20, 1967, to consider elimination of noncompetitive switching charges to or from industries located on the Port's property at Swan Island (Albina) and Rivergate to encourage industrial development there. Thereafter, railroads participating in the conference agreed to establish

a single basis of switching charges at all common points within Northern Idaho, Washington, and Oregon, with switching charges to be absorbed by the line-haul carriers where the line-haul minimum revenue is $100 a car after absorption, and no absorption of switching charges when specific tariff rate items are excluded. UP represents that when the agreement is implemented all industries within the Portland switching district including the Port's property area served by Peninsula, and points in North Pacific Coast territory will be on a competitive relationship except for the two conditions noted.

SP, a class I railroad, operates over trackage generally extending (1) from Portland south through Eugene and Klamath Falls, Oreg., Sacramento, San Francisco, and Los Angeles, Calif., Phoenix and Tucson, Ariz., El Paso and Houston, Tex., to New Orleans, La., (2) from San Francisco through Sacramento, Calif., Reno, Fernley, Weso, and Alazon, Nev., to Ogden, Utah, and (3) from Fernley to Klamath Falls. Service over these tracks is rendered by SP at many points south and east of Portland in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. At Portland, the northern terminus of SP tracks, as noted, connects with those of UP at an interlocking plant about 375 feet south of the eastern end of the UP-SP steel bridge across the Willamette River at Portland. SP maintains a large switching yard at Brooklyn known as the Brooklyn Yard about 2.6 miles south of the interlocker. Trains moving into Portland from the south over SP lines are generally sorted and blocked at Eugene, Oreg., about 125 miles south of Portland and move to Brooklyn Yard for further blocking if required before they are received by UP at East Portland. SP traffic to or from Peninsula moves principally over UP tracks from East

Portland through Albina Yard, St. Johns Junction to the North Portland interchange tracks. In some instances SP traffic also moves from East Portland across the steel bridge to the Portland Terminal Company yard, thence to Hoyt Street Yard for interchange with SP&S and movement over the SP&S main-line tracks to North Portland interchange. The distance from Brooklyn over the UP tracks to Peninsula is about 8.59 miles. An SP engine and crew is used to move cars from Brooklyn through East Portland, thence over the UP tracks to Albina Yard where they are received by UP for movement to Peninsula. The switch engine and crew of SP performs service from North Portland to Albina Yard as UP's agent. Similarly an SP switch engine and crew moves cars from Brooklyn over the alternate SP&S route to North Portland by operating as far as the Portland Terminal Company's yard where they are received by Portland Terminal Company, as an agent for the latter company. SP represents that if it is granted bridge trackage from the interlocker at East Portland to Peninsula at North Portland interchange tracks its engines and crews can operate from Brooklyn to North Portland. About 2 hours switching time would be required for a SP engine and crew to operate between Brooklyn and Albina Yard and an additional 1.5 hours between North Portland and Albina Yard or a total of about 3 hours and 30 minutes.

There are delays in the movement of traffic over the UP tracks between those points. A 10-percent random sample consisting of 42 cars (from a total of 410 cars) of SP traffic switched to and from Peninsula during 1967 in evidence reveals, among other things, an average of 32 hours and 10 minutes required for car movements from the SP interchange points to Peninsula when switched by UP or SP&S and an average of 55 hours and 16 minutes when

moved from Peninsula to the SP interchange point. SP represents that 30 hours or more required for the movement of cars between Albina and North Portland interchange is excessive and that SP with bridge rights can provide faster service. From 25 to 57 trains, or an average of 40, move over the UP tracks between Albina Yard and North Portland each 24 hours. SP anticipates no operating difficulties or labor complication in connection with its proposed operation over the described UP North Portland-Brooklyn Yard tracks. During 1967 about 490 cars were moved between Brooklyn Yard and North Portland interchange tracks over the described routes. It further represents that the proposed operation of unit trains of iron ore over the described UP tracks to and from Peninsula is feasible.

Milwaukee, a class I railroad, operates over main lines from Seymour, Ind., through Chicago, Ill., Minneapolis, Minn., Seattle and Tacoma, Wash., to Longview, Wash., a point on the Columbia River about 46 miles from Portland. Its main lines also extend from Chicago to Council Bluffs, Iowa, and to Kansas City, Mo. It serves the grain producing areas in Montana and eastern Washington and provides a connecting carrier service from those points to Portland. It also serves much of the forest products producing area in Idaho and Washington and industries in Tacoma, Seattle, Everett, and Bellingham, Wash., north of Portland. Also, service is rendered at the industrial cities, among others, of Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, Davenport, Rock Island, Moline, and Bettendorf. At the time of hearing it performed no physical operations to and from the Portland area and was awaiting final disposition and consummation in * * * [of the *Northern Lines* case]. If the Milwaukee petition herein for inclusion is authorized it expects to operate fast trains between Chicago,

Seattle, and Portland and between Portland and Sumas, Wash., with connection at the latter point with British Columbia railroads. However, such service cannot be established if terminal delays occur at Portland which offset the proposed service advantages. Its proposed service at Portland includes physical operation of its equipment to and from the Peninsula interchange tracks at North Portland. All the industries on Peninsula would be served as on-line industries with no absorption of switching charges. Despite postponement of the effective date of consummation in the *Northern Lines* merger case pending consideration of various petitions, Milwaukee expects the merger will be confirmed and consummated within a reasonable time, and contingent upon its extension of operations to Portland, requests joint and equal ownership of Peninsula stock with other trunklines and proposes to assume its share of the portion of the stock and indebtedness as set forth in the application. Its joint ownership is considered essential to its Portland operation to industries located on Peninsula and at Rivergate. Peninsula is the only terminal facility at Portland not owned by trunklines presently serving that point.

Milwaukee has a centralized, computerized expedited service for tracing, reconsignment, and diversion of cars and for the elimination of car delays. It owns 39,000 freight cars and in 1967 it transported 61,140 trailers in its trailer-on-flatcar (TOFC) service. It maintains facilities at various points for the loading and unloading of this type of traffic. Since 1963 it has maintained a 55.5-hour schedule service from Chicago to Seattle and 67.25-hour return. * * *

Milwaukee is not owned or controlled by any other railroad and does not own or control any other parties to the instant proceedings directly or indirectly. Its officials and directors have no common interest in such parties to this

proceeding. Milwaukee does own an interest in a number of other transportation companies not particularly pertinent to these proceedings.

INTERVENERS' EVIDENCE

The Port's position is that Rivergate's development requires services of all the involved line-haul rail, barge, and ocean vessel carriers serving Portland with service at competitive rates, and that all the rail applicants should be afforded equal operating access to Rivergate. It expresses a need for fast reliable freight service at Rivergate through Peninsula provided on equal terms by all present and future railroads serving Portland which can be accomplished by joint ownership. The Port desires the services of all the railroads to facilitate to mechanized rapid handling of liquid and dry bulk commodities, containerized commodities, and other general freight between Rivergate and points throughout the United States. It asserts that singlecar switching to and from small industries with so-called one-car sidings has become obsolete. Such switching is uneconomical because of engine and crew costs, and obsolete because trucks can more effectively perform a small shipment service.

The western district class I railroads traffic increased 36.2 percent in the 9 years following 1958. The Port's transportation consultant estimates that by 1990 traffic of those railroads will double, if adequate rail facilities are provided, and that Portland would share in its growth. Adequate facilities would include the most efficient mechanically fitted freight handling terminal with low freight handling costs possible through greater movement of intermodal traffic. After Rivergate's development, the Port estimates that from 500 to 600 cars or an average of 20,000 tons daily will move to and from the district; that daily service will

require 1 unit train, 1 semiunit train, 1 semiunit TOFC train, 2 industry trains, and 2 switching runs, and that the types of service would include provision for (1) bulk commodity unit trains (never uncoupled), (2) semiunit-train service for handling the less mechanized traffic to move in blocks of 40 to 150 cars, (3) TOFC service, and (4) miscellaneous and switching service. Rivergate is represented as affording opportunity for use of new technology in rail terminal service by use of unit and semiunit trains, and the elimination of lost car movement time usually incurred at terminals. UP and SP&S, as noted, are the only carriers presently having direct access to Rivergate through the eastern and western entrances. The Port indicates that unless the four applicant railroads are afforded equal access to Peninsula its owners would create unsatisfactory non-single-line switching conditions for the other lines; that unit-train bulk traffic is impeded equally as much by switching delays as by traffic interchanges; that if Milwaukee traffic is switched by SP&S or UP before reaching Peninsula, Milwaukee's single-line efficiency to and from points in such States as Indiana and Iowa will be impaired; that if SP traffic is similarly switched, its single-line advantage to and from such points as Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans, and Memphis will be limited. The Port represents that existing uncorrelated transfer of freight cars within the Portland switching district will not meet Rivergate's rail service needs; that uncoordinated switching operations at Portland result in a minimum 24-hour transfer time, and sometimes 3 or 4 days for operations across the switching district compared to a few hours required for cross-city truck movements. Peninsula assertedly will be useful to Rivergate only if it can handle unit trains of 100 cars or more which Peninsula's track facilities presently will not accommodate.

Economic and statistical evidence relating to Rivergate presented by the Port's Research and Planning Department reveals, among other things, the following: The Columbia-Willamette system is the second largest river improvement project in the United States. The Federal Government and the Port together, up to December 31, 1967, expended $120 million in improving the system. Ultimate public and private investment at Rivergate is expected to exceed $500 million. The Research and Planning Department is responsible for obtaining the described D.M.-J.M. commercial engineering Rivergate survey, report, and recommendations. The Port's long experience in marketing and research and its recognization of current technological transportation changes influenced its support of joint ownership of Peninsula by all the line-haul railroads serving Portland. The value of waterborne imports and exports in the Portland Custom District increased 313 percent from 1954 to 1966, compared to increases during that time of 201 percent at Los Angeles, 128 percent at San Francisco, and 132 percent at Washington ports. The Portland oceanborne traffic increased from 8,535,686 short tons in 1955 to 10,489,989 tons in 1965, or 22.9 percent.

The Portland Commission of Public Docks, City of Portland, favors joint ownership and operation of Peninsula and direct access to Rivergate by all line-haul railroads serving Portland. It is particularly interested in the transportation cost to shippers for movements to and from Rivergate, and asserts that noncompetitive transportation costs there would preclude consideration by industries of Rivergate as an industrial site. The Commission represents that establishment of a $100 per car line-haul revenue minimum as proposed in the Conference of Railroad Presidents June 20, 1967, agreement to establish a single-basis switching charge at competing Pacific Northwest points would

adversely affect Rivergate shippers' interest without equal ownership by all the line-haul railroads in Peninsula. Railroads with no such interest for economic reasons would be required to assess switching charges, while owner-carriers subject to their own tariff provisions could absorb switching costs on the basis of a lower applicable car minimum revenue. Numerous illustrations of instances in which this might occur are in evidence. For example, a nonowner carrier subject to the P.C.F.B. tariff No. 35, I.C.C. 1098, item 685, naming a rate on cans, fibreboard, set up, of 40.5 cents a hundredweight, 14,000-pound minimum weight, from Portland to Banks, Oreg., representing a minimum-car revenue of $84.70 would be required to assess an additional charge while an owner-carrier would absorb such a charge. Also, pointed out is the second exception to the proposed switching agreement which provides that switching charges will not be absorbed in instances where excluded by specific tariff provision.

The Public Utility Commissioner of Oregon, favors joint ownership of Peninsula by all line-haul carriers serving Portland. Evidence presented by the Commissioner covers geographical and physical characteristics of the involved transportation area. It reveals, among other things, that in addition to the five major railroads, NP, GN, SP&S, UP, and SP presently serving the Portland area, 275 motor carriers operate to, from, or within Portland. Fifty-one of these carriers are regular-route general-commodity carriers all authorized to serve Rivergate within the Portland commercial zone. Tables in evidence presented by the Commissioner show that the annual operating revenue of Peninsula has ranged from a high of $161,292 in 1956 to a low of $75,949 in 1963. Its average revenue per car for switching

service increased from $7.93 in 1950 to $27.71 in 1966. Peninsula's net operating income has ranged from $39,253 in 1955 to a deficit of $4,153 in 1962. While it operated at a deficit in 1962 and 1963, its income has since considerably improved. The commissioner represents that the future need of Peninsula is closely related to development of Rivergate and the granting to SP and Milwaukee of direct access to Peninsula would provide present and future industries served by Peninsula direct service by all line-haul railroads serving Portland.

Through rates and charges of SP&S, GN, NP, and UP are presently applicable to industries served by Peninsula. SP does not interchange traffic at Peninsula and depends upon SP&S or UP switching service between the SP interchange at Portland (Union Station) or East Portland and the North Portland interchange. SP presently absorbs the switching charges on traffic moved to or from Peninsula subject to a per-car minimum charge of $67 plus increases. Peninsula industries pay UP or SP&S for switching between North Portland and East Portland when the published through rates do not provide for absorption of the switching charge. For example, a switching charge is applicable to noncompetitive traffic originated by SP in Oregon moving to Peninsula.

* * * * * * *

Zellerbach, the second largest producer of paper and paper articles in the United States and also a producer of industrial chemicals, has its principal manufacturing and shipping facilities located in the Portland area. It also has paper mills at Camas, Wash., and Wauna and West Lind, Oreg. It ships in excess of 1,100 carloads of the described commodities each month from the Portland area to

various points throughout the United States. Zellerbach has or expects to establish four facilities in the Portland area. One is a distribution complex, Water Way Terminal Company, served by the Portland Terminal Company and Western Transportation. The latter is a certified water carrier owned by Zellerbach which has connections with a number of other carriers. At the time of hearing, Water Way Terminal Company facilities were being expanded and Zellerbach was negotiating for the purchase of a 1,500-waterfront property located adjacent to Ashgrove Lime Company at the western end of Rivergate. The second is a pole yard located on 40 acres of land owned by Zellerbach at the eastern end of Rivergate. The pole yard, as noted, is served by Peninsula. The third facility is the planned construction of a 200,000-square foot warehouse to be located on 44 acres of land purchased from Swift & Co. At the time of hearing the land purchase was waiting escrow clearance. The land is about 500 yards east of the SP&S main line at North Portland. The warehouse is expected to be used for the storing and distribution of products of the adjacent Zellerbach Flexible Packaging Division plant, the fourth facility.

During the 12 months ending November 30, 1967, 365 freight cars moved to or from the Flexible Packaging Division plant and 638 freight cars (177 shipments) to and from the pole yard. The shipper's poles now move in 65-foot drop-end gondola cars supplied by the rail carriers. Sixty-four percent of the 177 pole shipments involved delays due to Zellerbach's inability to obtain suitable cars when needed. The delays ranged from 1 to 26 days, or an average of 4.5 days each.

Zellerbach supports each of the applications and petitions because authorization of the proposals would increase the number of carriers having direct access to Peninsula and increase its ability to obtain suitable cars, and because it desires service at its Rivergate facilities comparable to other transportation at Portland. It represents that such access could result in the elimination of a 22-degree curve in the present Peninsula tracks so that 85-foot pole cars can be accommodated thereon. Zellerbach represents that if SP had direct access to its pole yard, it would request that carrier's service more often. The Zellerbach representative could recall no instances in which it paid separate switching charges for service to and from its facilities located on Peninsula. Zellerbach indicates that the greater the number of connecting carriers required for handling a shipment the greater the number of rate divisions and cost of service.

Oregon Steel Mills, a division of Gilmore Steel Corporation of San Francisco, within the past 2 years has acquired 152 acres of Rivergate land where it is presently erecting a new steel plate mill. Several phases of construction of the mill are contemplated. The first phase cost is $35 million. Upon completion of the first phase mill, it will produce 200,000 tons of steel plate annually and upon completion of the entire mill the ultimate mill's capacity will be 700,000 tons. The mill site was located at Rivergate because it affords room for the mill's expansion and for the location of related steel fabricating industries near it and because Rivergate is considered by this shipper as a transportation hub. There are presently steel plate mills located at Provo, Utah, and Fontana, Calif. The Rivergate mill will be the first producing steel plate mill located in the Pacific North-

west and its location will result in the establishment of a steel basing point at Portland, whereas up to this time the steel basing points have been at Provo and Fontana. Ore for use at the mill presently will be provided by Marconi Company transported by water carrier from Peru to Rivergate. However, Gilmore Steel Corporation owns large iron ore deposits near Mount Shasta, Calif., near a line of the SP. Arrangements are in progress for procuring iron ore at the Shasta location. Oregon Steel Mills expects to ship unit trains of ore from Shasta to the Rivergate mill and has obtained assistance and information respecting proposed transportation costs from SP, which in turn procured proposed costs of switching at Portland from UP. SP, prior to the filing of its applications, proposed to transport the shipper's ore from Shasta to the UP Portland interchange in SP equipment, including all terminal service charges at Shasta at $3.85 a gross ton subject to a tariff docketing proposal, and information received from SP respecting the proposed UP switching costs which was confirmed through the UP rate department was $0.23 a gross ton from the UP-SP interchange at Portland to Rivergate. Oregon Steel Mills prefers a single traincrew and through round trip unit-train service. UP indicates it cannot provide this type of service at Portland because union contracts require the use of local power equipment and the payment of the Portland crew for a minimum worktime. The shipper represents that it would start mining ore at Shasta as soon as economically feasible, that its ore can move economically only in unit trains in the service of a single carrier with no connections and that it supports the SP applications to enable direct access to its Rivergate plant by SP through North Portland. The shipper is aware that major fill and track construction would be necessary before operation from Shasta through

North Portland becomes possible. It indicates that Rivergate is being developed by use of public tax money and it believes direct access to Rivergate should be afforded through all rail carriers.

Collier Carbon & Chemical Corporation, a Union Oil Company subsidiary, is constructing a new $2 million distribution facility north of the Ashrover Lime Company plant on the western side of Rivergate. The plant, to be in operation by the Fall of 1968, expects to use the direct service of SP, among other rail carriers, for the movement of its products from Rivergate. Urea, used in the manufacture of resins and fertilizer and as a cattle feed ingredient, is to be shipped by water carriers to the facility and to be reshipped by rail, truck, and water carriers to its customers. It is particularly interested in obtaining SP service for movements to western Oregon points and supports the SP applications because direct SP service would provide it suitable transportation to western Oregon points within provision of reasonable transit time, car availability, and rates. It has no preference as to the carrier switching its traffic to a belt-line or terminal company.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of June 1969.

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF TERMINAL FACILITIES—PENINSULA TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF CERTAIN TERMINAL FACILITIES—UNION PACIFIC RAILROAD CO.

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, in Finance Docket No. 24679, subject to the conditions referred to in said report, acquisition by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company of control of the Peninsula Terminal Company through the purchase of its capital stock, as described in said report and under the terms and conditions found therein to be just and reasonable, be, and it is hereby, approved and authorized;

It is further ordered, That the petitions of the Southern Pacific Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company for inclusion in the transaction approved and authorized above in Finance Docket No. 24679, as described in said report, be, and they are hereby, denied;

It is further ordered, That in Finance Dockets Nos. 24890 and 24891, the applications of the Southern Pacific Company for common use of the facilities of the Peninsula Terminal Company and of certain trackage of the Union Pacific Railroad Company as described in said report, be, and they are hereby, denied; and

It is further ordered, That this order shall take effect and be in force from and after 35 days from the date of its service; that if the authority granted in Finance Docket No. 24679 is not exercised within 180 days from said effective date, this order shall be of no further force or effect; and that if the authority granted in Finance Docket No. 24679 is consummated, the applicants therein shall confirm in writing to this Commission, immediately thereafter, the date on which consummation has actually taken place.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION
Served September 24, 1968

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

Finance Docket No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Decided.....

In Finance Docket No. 24679 and related petitions, control by Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and the inclusion therein of Southern Pacific Company, through pur-

1. This report also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co.—Common Use of Certain Terminal Facilities—Union Pacific Co.

chase of all outstanding stock of Peninsula Terminal Company, and sale of an equal interest therein, subject to conditions subsequent, to Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and authorization of trackage use for access to Peninsula Terminal Company, found to be consistent with the public interest, and application and petitions in all other respects denied. Conditions prescribed.

In Finance Docket Nos. 24890 and 24891, common use by Southern Pacific Company of the terminal facilities, including trackage of Union Pacific Railroad Company between Peninsula Terminal Company and the Southern Pacific Company-Union Pacific Railroad Company connection at East Portland, Oreg., found to be in the public interest and to be practicable, without substantially impairing the ability of Union Pacific Railroad Company to handle its own business, and applications in all other respects denied. Conditions prescribed.

Hugh L. Biggs, James Warren Cook, Richard Devers, Randall B. Kester, F. J. Melia, R. Paul Tjossem, and *John F. Weisser* for applicants in Finance Docket No. 24679.

Charles W. Burkett, W. Harney Wilson, and *Oglesby W. Young* for applicants in Finance Docket No. 24890 and No. 24891, and petitioner in Finance Docket No. 24679.

Raymond K. Merrill, Warren H. Ploeger, Thomas H. Ploss, and *E. O. Schiewe* for petitioner in Docket No. 24679.

Lloyd A. Combs, William M. Dunegan, John L. Green, Richard H. Kraushaar, Robert K. Little, Hollis Menow, Harold A. Ross, Edgar E. Smith, Homra C. Watson, and *Milton A. White* for protestants in each proceeding.

Dale T. Crabtree, Samuel P. Delisi, Milton A. Mouat, Richard W. Sabin, Robert W. Skirvin, Lofton L. Tatum, Robert Y. Thornton, and *Henry M. Wick, Jr.* for intervenors in each proceeding.

REPORT AND RECOMMENDED ORDER BY SAMUEL C. SHOUP, HEARING EXAMINER

In Finance Docket No. 24679, by joint application filed July 25, 1967, Spokane, Portland & Seattle Railway Company (SP&S) and Union Pacific Railroad Company (UP), pursuant to section 5(2) of the Interstate Commerce Act, seek authority to acquire control of the Peninsula Terminal Company (Peninsula) through purchase in equal shares of all of Peninsula's capital stock.

By petition filed August 23, 1967, Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) seeks inclusion in the proposed transaction in Finance Docket No. 24679 and if consummated authorized (1) to purchase one-third of the outstanding capital stock of Peninsula (2) to pay one-third of the contribution to capital of $70,000 to cover the purchase of two diesel locomotives, and (3) to acquire rights over track jointly owned by UP and SP&S from the main-line of SP&S to Peninsula's lines upon reasonable terms and conditions as negotiated by the parties, or as found just and reasonable by the Commission. Separate replies to the petition were filed December 29, 1967, by UP and SP&S. UP contends generally (1) that Milwaukee is not a railroad in the territory as used in section 5(2) of the act because it does not serve the Portland terminal area, (2) that if Milwaukee is granted trackage rights between Longview Junction and Portland as a condition or to approval of the Northern Lines merger, in Finance Docket No. 21478, *Great Northern Pac.-Merger-*

Great Northern, 331 I.C.C. 869, nevertheless it would be unable to serve the Portland Terminal area unless there is a separate application and Commission's approval of operations under such trackage rights, (3) that if Milwaukee operates to and from the Portland Terminal area, it would not connect with Peninsula because the segment of track between Peninsula and the Northern Pacific Railway Company (NP)-SP&S main line is jointly owned in whole or in part by UP, NP, SP&S, and Peninsula, and joint use of such trackage cannot be granted in these proceedings, and (4) that joint stock control as requested is not in the public interest and would lead to cumbersome, confused, and divided management. SP&S in its reply generally alleges that inclusion of Milwaukee as a joint stock owner of Peninsula is not in the public interest and that joint use of trackage at North Portland to reach tracks of Peninsula is not in the public interest because of joint carrier use of the interchange tracks there.

By amended petition filed November 29, 1967, Southern Pacific Company (SP) requests as a condition to approval of the application in Finance Docket No. 24679, (1) that SP be included as an equal joint owner of Peninsula, and (2) that SP be granted bridge trackage rights over UP's main line, and terminal trackage between Peninsula and the SP-UP track connection at East Portland, Oreg., as a condition to participation in joint ownership of Peninsula under section 5(2)(d) of the Act, and in event either or both of the applicants decline to participate in the acquisition subject to such condition an order be entered pursuant to section 3(5) of the Act authorizing SP to use the said UP trackage. UP and SP&S by joint reply thereto, filed December 13, 1967, (1) contend that to grant petitioner's request would unduly broaden the issues, and (2) indicate

that such a request should be made in a separate proceeding pursuant to section 3(5) of the act.

In Finance Docket Nos. 24890 and 24891, by separate applications each filed December 19, 1967, Southern Pacific Company, pursuant to section 3(5) of the act, seeks, in Finance Docket No. 24890, (1) common use of the terminal facilities of Peninsula and (2) bridge trackage rights over UP between Peninsula and the SP-UP connection at East Portland, Oreg., and in Finance Docket No. 24891, common use of the terminal facilities of UP between Peninsula and the SP-UP connection at East Portland, Oreg. These applications were filed, in addition to the above described SP petition, to assure relief both under section 5(2)(d) and section 3(5) of the Act because of the permissive nature of conditional grants by the Commission under section 5(2) which the parties, in their discretion, may elect to exercise. *Houston Belt & Term. Ry. Co. Control*, 275 I.C.C. 289, 312.

The applications, and the petitions and replies thereto were referred to the examiner for hearing on a consolidated record and the recommendation of an appropriate order thereon. Hearing was held at Portland, Oreg., on February 26 through 29 and March 1, 1967. Eight railway employee organizations[2] oppose each of the applications. The Port of Portland Commission, the Public Utilities Commissioner of Oregon, and Crown Zellerbach Corporation intervened in

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2. Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Engineers Division representing employees of SP&S; Brotherhood of Locomotive Engineers (Union Pacific Railroad Northwest District, Oregon Division); Brotherhood of Railway Clerks representing employees of Portland Terminal Railroad; Brotherhood of Locomotive Engineers of Portland Terminal Railroad Company; Southern Pacific Railroad Yardmasters of North America, Inc.; Railroad Yardmasters of North America, Inc.; Portland Terminal Railroad Co.; and Switchmens' Union of North America.

each of the proceedings in support of positions hereinafter described. UP and SP&S oppose the SP applications in Finance Docket Nos. 24890 and 24891 and request that the petitions of Milwaukee and SP be denied. The parties hereto are hereinafter referred to by appropriate short titles. Briefs were filed separately by each of the applicants and petitioners in the proceedings, and by The Port of Portland Commission (The Port) and the Public Utility Commissioner of Oregon and Brotherhood of Locomotive Engineers.

Peninsula is a terminal railroad Oregon corporation subject to Part I of the Interstate Commerce Act engaged in switching operations at North Portland, Oreg. North Portland is within the Portland switching district. Portland is a major deep channel seaport, transportation, and distribution center serving the Pacific Northwest and the Continental United States. The western end of Peninsula's main line extends to a Crown Zellerbach pole yard (See Map, Appendix A) at the eastern tip of Rivergate Industrial District (Rivergate), hereinafter described, affording potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry; and public interest in these proceedings. Peninsula owns no tracks within Rivergate. It serves the pole yard by using industrial tracks of Zellerbach there. Peninsula was established as an essential for operation of Portland Union Stockyards (Portland Stockyards) to facilitate handling livestock, and to provide a rail connection between the stockyards and trunk-line railroads serving the Portland area. The Commission in Docket Number 8389 on October 18, 1930, authorized Peninsula to operate as a terminal switching railroad. Sometime prior to 1936, Swift & Company acquired interests in various stockyards and terminal rail facilities, in-

cluding the Portland Stockyards and Peninsula which the former owned. Pursuant to a consent decree obtained by the U.S. Attorney General in a U.S. Court injunction proceeding brought under the Sherman Act and the Clayton Act, Swift divested itself of stock interest in certain stockyards and terminal carriers. One of the properties, Portland Stockyards, was sold to United Stockyards Corporation (United), presently a division of the latter. Since January 1, 1968, Portland Stockyards has been leased to and operated by Portland Livestock Market, Inc. (Portland Livestock). Control of Peninsula, through stock ownership by United, was authorized by the Commission, Division 4, on March 9, 1943, in *Stockyards Ry. Co. Control,* 254 I.C.C. 207. United's interest in railroad operations extends only to those necessary for its stockyards' operation. Since it acquired Portland Stockyards, operations there have materially changed. Whereas, it was used to supply cattle for Swift's meat packing operations, it presently is an auction yard. Swift & Company presently processes only agricultural chemicals, hides, and wool at North Portland and the volume of that activity is expected to decline. Crown Zellerbach Corporation (Zellerbach) recently acquired the North Portland Swift property and expects to establish a 200,000 square foot warehouse and an ink manufacturing factory there. Zellerbach also has its Flexible Packaging Division plant at North Portland and operates the above-described pole yard at the west end of the Peninsula line in the Rivergate area. Peninsula serves thirteen industries on its line other than the stockyard. As a result of the changes, Peninsula has become less important to Portland Stockyards and United has no interest in operating a railroad independent of stockyard operations. It therefore proposes to sell all of the stock in Peninsula at a reasonable price established

through a 1962 appraisal by American Appraisal Company and has no preference as to the purchaser. The Commission is represented as having accepted the valuation of the properties of Peninsula based upon historical book cost. The agreed purchase price of Peninsula under a contract of purchase dated February 28, 1967, between United and SP&S and UP is a total of $299,405 for all outstanding shares of common stock of Peninsula plus a sum of $70,000 to reimburse United for two switch engines sold by United to Peninsula representing an unsecured account payable to United. Settlement to be made by checks of purchasers upon approval of the transaction. The appraisal was based on empty land, plus local costs of roadway and structures, less depreciation. Adjustment of the appraisal, at the time of contract of sale was made only as to rolling stock, working capital, and miscellaneous betterments. The President of Peninsula represents that the contract price is fair and reasonable.

Peninsula properties consist of 13.17 acres of land, none suitable for industrial development, 15,559 feet of main line track plus spurs and sidings or a total of 3.79 miles of main line and secondary and spur track laid on treated ties in sand with no rock ballast. The distance from one end of the line to the other is about 8,000 feet with a 5-foot elevation to its eastern end. The above-noted two locomotives owned by Peninsula consist of a 50-ton G. E. electric, and the other, a 70-ton Copper Bessimer electric, including tools and parts for operation and maintenance. Tools for track maintenance, a conveyance for workmen, a heated engine house for both locomotives, a yard office (14 feet by 23 feet 6 inches in size), and a sand house (11 feet by 18 feet in size) are also owned.

Officials of Peninsula are T. E. Rockford, President (also an employee of United), R. W. Hunt, Vice-President, C. N. Curtis, Secretary-Treasurer. All except Hunt are stationed in North Portland where they handle accounts, labor, claims, demurrage, and interchange, and clerical work of the carrier. They are all United-Peninsula joint employees. United pays them and bills Peninsula for a portion of their services. Insurance matters of Peninsula are handled by United in Chicago where Hunt is stationed.

Peninsula receives cars directly from and delivers cars to SP&S, NP, UP, and Great Northern Railway Company (GN) (empty and loaded) at North Portland, which total about 30 cars daily handled through the North Portland Freight Station with an office located at the Portland Stockyards. The cars move to or from double main-line tracks jointly owned by SP&S and NP, extending from Vancouver, Washington, south across the Columbia River, through North Portland and across the peninsula at the junction of the Columbia and Willamette Rivers (the peninsula) to SP&S Doan Street Yard and the Portland Terminal Company's Guild's Lake Yard. At North Portland there is, among other things, a head block on the SP&S-UP tracks and a 259.5-foot track extending therefrom to four North Portland interchange tracks 2,400 feet in length which accommodate from 30 to 35 cars each. One, is used by Peninsula for receipt of cars from the trunk lines. The second is used by Union Pacific to receive cars from Peninsula, GN, NP, and SP&S. The third is used by SP&S, NP, and GN to receive cars from Peninsula and UP, and the fourth is an open or running track. Two of the interchange tracks are owned, one-half by Peninsula, and one-half jointly by UP, SP&S, and NP. The other two tracks are owned jointly by UP, SP&S, and NP. The interchange tracks connect directly

with Peninsula's main line track to the north and also with a single-line track of OWR&N (a UP subsidiary) extending about 1.7 miles southerly across tracks of UP to Peninsula Junction, and thence about 2.6 miles through a tunnel near St. Johns Junction to Albina Yard. The interchange tracks are used by Peninsula, UP, NP, and SP&S as joint owners, and by GN under a contractual arrangement. The use includes interchanges between the four trunk lines and also between those lines and Peninsula. Actually about 8,100 cars are interchanged there of which 39 percent represents Peninsula interline business. All the cars are either billed from or consigned to industries in the Portland area. Service at North Portland is provided through a joint local freight agent of the trunk lines who informs Peninsula of industry service requested as to outbound moves. The agent prepares the inbound interchange reports and Peninsula the outbound interchange reports. Outbound bills of lading of the four trunk lines are signed by the joint agent. Expenses of maintaining the North Portland station are prorated among the four lines by car count, loaded and empty, with the joint facility invoice prepared by the operating road, UP or SP&S. The joint agent recommends no routings for shippers and receives no open-route car orders. Usually there are four deliveries and two pickups daily of cars moving to or from Peninsula by SP&S or UP. Cars from Peninsula could move by UP to the pass near Peninsula Junction, to Kenton Yard (about 2.6 miles southeast of Peninsula Junction) or to Albina Yard. Cars picked up from Peninsula by SP&S usually move to Vancouver. In addition to the above-described North Portland Freight Station, there is a yard office at the eastern end of the interchange tracks. The yard office is maintained jointly by

SP&S and UP under terms of a 1912 agreement which established the North Portland Freight Station. Four clerks at the yard office are UP employees and four clerks at the North Portland Freight Station are SP&S employees.

Peninsula also provides local intra-plant and intra-terminal service. It has established Local Switching Tariff No. 23, effective September 23, 1965 (not applicable to rail line haul service), which among other things provides a $22.44 per car charge for each car movement and service charges for the handling of livestock. No other switching tariff is published by it. Peninsula solicits no traffic and traces no shipments moving beyond its line. Revenue from its connecting rail carrier service is derived from a division of revenue, billed and collected by the trunk line, generally amounting to $29.25 a car when the car revenue exceeds $60. The agreed rate divisions were established by Joint Division Sheet 8-R issued by North Pacific Coast Freight Bureau, Seattle, Wash., effective July 1, 1964. Usually the line-haul carriers absorb the division charges. Its locomotives and crews operate two 8-hour shifts each day of the week, one from 9:00 a.m. to 5:00 p.m. and the other from 9:00 p.m. to 5:00 a.m. Light repairs of roadbed and equipment are made by regular Peninsula employees and heavy repairs by part-time employees. Since January 1, 1968, by agreement with Portland Livestock, Peninsula employees load and unload livestock.

Basic Labor agreements were entered into by Peninsula on April 14, 1943, with the Brotherhood of Railroad Trainmen and on June 15, 1941, (since modified) with the Brotherhood of Locomotive Firemen and Engineers. Peninsula engineers are paid $29.05 or $32.68 a day for service exclusive of repairs and maintenance with no holidays. They receive vacation and insurance benefits equivalent to employ-

ees of trunk-line carriers. Switchmen receive $27.88 a day and the footboard yard master $30.21 with seven annual holidays, extra pay for work on holidays, and vacation, insurance and welfare benefits similar to the engineers'.

United has agreed to manage Peninsula after the purchase in accordance with policies of its director, including supervisory, accounting, stenographic and other necessary managerial services as presently provided. United may terminate the agreement on 6 month's notice and the purchasers may terminate it on 30 day's notice.

During 1960, Peninsula handled 4,993 loaded or partially loaded cars compared to 2,748 cars in 1967. The latter represents about 39 percent of all cars interchanged at North Portland. The other 4,300 cars were interchanged between SP&S, NP, and GN, on the one hand, and, on the other, UP. From 1960 through 1967, there was a decrease in movements of livestock and packinghouse products and an increase in wood products. For example, in 1967, 34 percent of the cars handled transported wood products, 33 percent chemicals, 8 percent livestock, 7 percent packinghouse products, 13 percent paper products, and 5 percent other. In 1960, 16 percent of the cars handled wood products, 8 percent chemicals, 48 percent livestock, 15 percent packinghouse products, 6 percent paper products, and 7 percent other.

The statement of assets and liabilities of Peninsula as of February 1967, reveals total assets $239,716, including current assets, $35,038 (cash on hand, $17,365, accounts receivable, $7,888, materials and supplies, $8,669, and prepayments of insurance and other, $1,116), properties—transportation road and equipment, less depreciation, $196,938, and miscellaneous physical property, $7,740. Its expense

and retained income statement for each of the calendar years, 1962 through 1966, and for February 1967, reveals, among other things, total railway operating expenses for February 1967, $14,774, and for 1966, $81,244, total income before fixed charges for February 1967, a minus ($725) and for 1966, $13,320 less miscellaneous rents paid, $1. Rent for leased road equipment for 1966 was $3,200 and for January 1967, $533. The balance of retained income for February 1967, was $7,504 and for 1966, $8,762. At the beginning of 1962, its retained income was $151,208, which by the end of February 1967, was reduced to $7,504, after adding annual income (less losses), and subtracting dividends of $167,556 paid during 1966.

Rivergate Industrial District (Rivergate) consists of about 2,942 acres of public owned peninsula land at the junction of the Columbia and Willamette Rivers generally north of and adjacent to Portland's corporate limits. This land is under the jurisdiction of, and is being developed by, The Port for industrial use. It has about 6 miles of water front on 40-foot navigation channels of the Willamette and Columbia Rivers. Presently there are five industrial activities within Rivergate together occupying 265 acres, or less than one-tenth of the ultimate available area. These are Ashgrove Lime and Portland Cement Company, Conmetco Division of Consolidated Freightways, Collier Carbon and Chemical Company, and Oregon Steel Mills on the western side and the Zellerbach Pole Yard on the eastern end. Much of it is marsh land to be filled by dredging operations. An 18-month planned study of a 14 square-mile peninsula area including Rivergate by The Port's consultants, Daniel, Mann, Johnson, and Mendenhall of Los Angeles, Calif., known as the D.M.-J.M. report was dated September 14, 1967. Recommendations therein include a Rivergate railway system connecting with rail trunk lines. Two alternate

Rivergate rail access routes include (1) that over the existing tracks of The Port which connect with those jointly owned by SP&S and UP entering the southwestern area of Rivergate, and (2) the possible construction on the eastern side of Rivergate of an SP&S main line extension or an extension of Peninsula's tracks into the area.

SP&S, a class I railroad, and a wholly owned subsidiary of NP and GN, operates over lines generally extending from Spokane through Pasco along the north side of the Columbia River to Vancouver, Wash., thence across the Columbia River through North Portland, thence across the east-west line of UP on the peninsula, and thence across the Willamette River, through Doane Lake Yard and Willbridge, Oreg., to Guild Lake Yard. The latter connects with Portland Terminal Company tracks in downtown Portland. A connecting track at the intersection of SP&S and UP lines on the peninsula affords access to Barnes yard. SP&S has trackage rights at Barnes Yard and at Terminal No. 4. UP and SP&S jointly own tracks extending from Barnes Yard to the southwestern side of Rivergate which connect there with those of the Port of Portland. The SP&S Vancouver-Willbridge track, constructed in about 1908 with an industrial spur at North Portland, is jointly owned by SP&S and NP. In 1909 OWR&N (UP) constructed a track connecting Albina with the spur track, and a year later built a bypass track at the North Portland Junction. The bypass enables operation between Albina and North Portland interchange tracks without entering the SP&S-NP main line. SP&S and NP switch cars at North Portland on a 2-year alternating basis. Additionally, SP&S owns Oregon Trunk Railroad extending from Wishram, Wash., a point on the SP&S line, to Bend, Oregon, and also owns Oregon Electric Railway Co., extending south from Portland to Eugene,

Oregon. SP&S directly serves industries on its lines and those on lines used jointly by it located on the southwest side of the Willamette River at Portland including industries and docks also served by Portland Terminal Company. It serves industries at East Portland by use of the UP-SP steel bridge across the Williamette River near the Portland Terminal Company's Depot and yard. SP&S switches cars to and from points in the East St. Johns and the Terminal No. 4 areas north of the Williamette River and south of Rivergate. SP&S delivers cars daily to the North Portland interchange tracks at 2:30 a.m. and 11:00 a.m. and picks up cars there at 9:30 a.m. and 6:00 p.m. UP also picks up and delivers cars there daily at 6:30 a.m. and 2:30 p.m. The switching distance from North Portland interchange tracks to connection with SP at Albina yard or Portland Terminal Company Hoyt Street yard is about 6 miles and cars switched from and to those points should require about one hour. North Portland line haul traffic of NP and GN is usually moved twice daily to and from Vancouver. SP&S switches all Vancouver cars including those of UP. SP&S assesses a tariff switching charge for movement of cars to and from Peninsula interchange. It is possible for GN, NP, and Burlington under joint arrangements to handle Milwaukee traffic to and from North Portland interchange tracks. SP&S as owner of Peninsula could obtain Peninsula trackage rights which are essential to any agreement for switching operations. Presently Milwaukee could interchange cars with SP&S at Vancouver for movement to the peninsula by payment of a division of the through rate. In the absence of Milwaukee trackage rights there the receiving carrier could designate car delivery points of Milwaukee cars. With interchange trackage rights at North Portland it could enter into a car pulling agreement for movements from Vancouver.

SP&S indicates that the extension of Peninsula to serve the Rivergate is uncertain because of heavy curvature, impaired clearances, and low standard tracks of Peninsula, but alternation will become necessary with growth of the district; that a new direct access track from the SP&S main line at North Portland may be feasible; and that if such a track is constructed SP&S and UP have assured the Port of Portland they would provide service similar to that now available in the southwest part of the district. SP&S has made no decision respecting the planned additional access route to Rivergate. It expects to provide adequate switching service into the area as required.

SP&S opposes any ownership of, or trackage rights to serve, Peninsula by SP and Milwaukee, and indicates such rights and ownership would result in unnecessary duplicating tracks and service contrary to the public interest. It represents that existing routes, rates, and traffic will not be affected by the SP&S-UP proposed purchase of Peninsula. Milwaukee and SP now serve Peninsula shippers through connecting carriers and use of joint rates and routes. UP and SP&S and its parent lines provided line-haul service for about 70 percent of Peninsula's traffic during 1966, and 82 percent in 1967. The interchanging of 3,640 cars handled during 1966, between Peninsula and UP, and SP&S and parent lines was 54 percent for SP&S and parent lines and 46 percent for UP. Twenty percent of the cars were routed SP and 1 percent Milwaukee. In 1967, SP routed 17 percent and Milwaukee 1 percent of the line haul for 2,748 handled by Peninsula. Nevertheless, a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching

carrier has a solicitation advantage. If Milwaukee has no direct Rivergate access on competitive traffic it must absorb an SP&S switching charge (presently 6 cents a hundredweight) and pay a Peninsula rate division of $29.25 a car when the car revenue exceeds $60, on its traffic which would move through East St. Johns. Usually, line-haul carriers absorb no switching charges on unit train service or cars containing low rated commodities, and the payment of such charges by shippers discourages business. SP&S indicates Milwaukee might participate in a greater share of Peninsula traffic if its operation is extended to Portland. The SP&S representative concedes that if Milwaukee owns no part of Peninsula and cannot use the North Portland interchange tracks, it cannot compete equally with SP&S for Peninsula traffic. However, SP&S is willing to accept the standard section 5(2) proceedings' conditions (See *Southern Pacific Company—Merger—Pacific Electric Railway Company*, 327 I.C.C. 38) in event of a grant to assure participation by SP and Milwaukee in traffic moving to and from Peninsula as follows:

> Upon consummation of the acquisition, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission.
>
> The present neutrality of handling traffic inbound to Peninsula by UP and SP&S shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through their connections with UP and SP&S and its parent lines, without discrimination as to routing or movement of traffic and without discrimination in arrangement of schedules or otherwise.

The present traffic and operating relationships existing between Peninsula on the one hand and all lines reaching Peninsula through UP, SP&S or its parent lines on the other, shall be continued insofar as such matters are within the control of UP, SP&S or its present lines.

UP, SP&S and its parent lines shall accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination, in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

UP, SP&S or its parent lines shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways.

Any party or person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction of the Commission may be retained to reopen this proceeding on the Commission's own motion for the same purpose.

SP&S first became aware of United's desire to sell Peninsula in 1963, but serious purchase negotiations were not commended until sometime in 1966. When UP learned of the negotiations it became a party to them. If the application of these carriers is granted they intend to continue the corporate entity of Peninsula and its present management with present employees under joint supervision by the purchasers. The same management would permit an orderly carrier transition. SP&S has no objection to the Commission's prescription of conditions for protection of employees

as set forth in *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672, as follows:

> During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date or such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

The SP&S parent companies' ownership is in issue in *Great Northern Pac.—Merger—Great Northern, supra.* Pursuant to proposals therein, on October 26, 1966, Milwaukee entered into a written agreement with GN, NP, Chicago Burlington & Quincy Railway, SP&S, and the New Company (The Great Northern Pacific & Burlington Line, Inc.), which as pertinent provides:

> Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, et al., the Milwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:
>
> ***Condition No. 2—Entry into Portland and Trackage Rights between Longview Junction and Portland.***

Provisions of the agreement relating to implementation of Condition No. 2 require the New Company or SP&S, where possible, to grant Milwaukee trackage rights over present NP and SP&S tracks between Longview Junction and Portland, including the right to serve on an equal basis all pres-

ent and future industries at Portland and intermediate points and the use of New Company facilities at Portland necessary for the switching of traffic to other railroads and industries. There is no specific reference therein to North Portland, or use of the North Portland interchange tracks.

The SP&S financial statement as of February 28, 1967, shows total assets, $139,634,532, including current assets, $12,775,147, special funds, $123,381, investments, $30,586,097, properties less depreciation and amortization, $95,735,982, and total other assets and deferred charges, $413,925. Liabilities include current liabilities (exclusive of long-term debt due within 1 year), $8,928,010, long-term debt due within 1 year, $793,842, long-term debt due after 1 year, $45,650,781, reserves, $156,042, other liabilities and deferred credits, $158,704, capital stock, $40,000,000, capital surplus, $9,300,000, and retained income, $34,647,153.

UP, a class I railroad corporation, as pertinent, operates over trackage extending (1) from Seattle to Portland, (2) from Portland, through O. T. Junction, and Hinkle, Ore., Pocatello, Idaho, and Cheyenne, Wyo., to Omaha, Nebr., (3) from Cheyenne, through Denver, Colo., to Kansas City, Mo., (4) from Spokane, Wash., to Hinkle, (5) from O. T. Junction, Oreg., to Bend, Oreg., and (6) from Pocatello to Los Angeles, Calif. UP connects at Bend with GN which latter carrier's line extends through Chemult and Klamath Falls, Oreg., and Bieber, Calif., to connect there with Western Pacific extending through Sacramento to San Francisco, Calif. UP tracks enter Portland from the east forming a great loop extending from a wye near Troutdale, 14 miles east of the Williamette River at Portland. One track extends from Troutdale generally west parallel with the Columbia River through Kenton Yard, Peninsula Junction, across the SP&S-NP tracks which enter Portland from the north, thence

through Barnes Yard to the southwestern side of Rivergate and Terminal No. 4, and returns along the north side of the Willamette River through St. Johns Junction located in Swan Island Industrial Park, through Albina past the entrance of the Steel Bridge (which affords access to the Portland Terminal Company's yard and depot in downtown Portland) to East Portland (junction with SP), thence generally east through Sullivan Gulch to Troutdale. Track at the west end of the loop near Barnes Yard jointly owned by SP&S connects with Rivergate where UP has served Ash Grove Lime and Cement Company. An OWR&N (UP) track segment extends from North Portland interchange tracks, through St. Johns Junction, and Albina Yard to East Portland. This track, not a main track, was mentioned in connection with SP&S tracks. It crosses the western end of the UP loop as does the SP&S-NP tracks west thereof. This segment of track is of particular significance in these proceedings. SP traffic now moves or is expected to move over it. An issue respecting congestion of traffic on the track segment is raised by UP in its opposition to the SP proposals. The distance over the segment from North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. From the connection of the North Portland interchange tracks with Peninsula over the OWR&N tracks to its intersection with the UP track at Peninsula Junction is about 2.04 miles. At this intersection connections permit switching in four directions. Operation over the turnouts there is limited to 15 miles per hour. Near this intersection UP also has a bypass track which will accommodate about 10 cars. The distance from Peninsula Junction over the segment south through a 1-mile tunnel to St. Johns Junction is about 2.16 miles and the distance beyond St. Johns Junction over the segment to the north end of Albina Yard is 1.02 miles. The track segment generally is level with the exception of the 5/10 of 1 percent grade increase from Albina Yard to the

center of the tunnel. There is only one significant highway grade crossing on the segment at Columbia Boulevard which has a flashing light signal. There are also two or three private grade crossings near Peninsula Junction. Between Albina Yard and North Portland there is a 131-pound single-line track laid on rock ballast having no curves which create operating problems. Operation over the segment of track between Peninsula Junction and Albina Yard is presently controlled by a central traffic control system from Albina Yard. Albina Yard is a large and important classification and transfer yard of UP including about 44 tracks which will accommodate from 15 to 20 cars each extending about ¾ of a mile in length. The Williamette River lies along the western side of the yard and a super highway and a bluff lie along its eastern side limiting expansion. However, a map in evidence reveals that the yard at its center is about 500 yards wide and near its south end 666 yards wide. Most UP traffic to or from the Portland area moves through this yard. There is a 400 by 150-foot freight house at the south end of the yard. This is used in part as a salvage depot by UP and in part by shipper lessees. All of the tracks are used for switching purposes by UP. It endeavors to keep open one or two of the center tracks in the yard to accommodate through traffic. None of the tracks are permanently designated as running tracks although a substantial amount of through traffic moves through the yard. UP operations at Albina Yard are represented as taxed to capacity, with no room for expansion there. Switch engines operate out of there to serve Kenton Yard, North Portland Barnes Yard, East Portland, Sullivan Gulch, and Portland Terminal Company. They move, in addition to freight, passenger trains to and from Portland Station. Two such trains operate each way daily through Sullivan Gulch. Other passenger

trains moved by engines from Albina operate out of Portland station over the SP&S main line through North Portland and not through Albina Yard. Five UP freight trains operate each way daily over the track segment between Albina Yard and North Portland Junction. Delays at North Portland Junction interlocker are not uncommon with some delays as long as 80 minutes. SP uses the track between Brooklyn Yard and Albina Yard for freight moving to and from North Portland. The speed of traffic through the interlocker at East Portland is limited to 8 miles an hour. SP proposes to handle cars from Brooklyn to North Portland. UP represents that if the SP applications are granted congestion would occur principally on the single-track segment between St. Johns Junction and Peninsula Junction; that three fourths of the UP trains arriving at Albina Yard via Kenton are delayed from 15 to 180 minutes because of Albina Yard congestion. Also, there is a 1.2 percent grade on the UP track 1 mile east of East Portland which tends to retard car movents. Usually engines stationed at Kenton Yard are used for switching between Albina Yard and North Portland. There has been a consolidation of the Kenton Yard and Terminal No. 4 engines to eliminate congestion of traffic. There were about 40 to 56 switching moves daily in the Peninsula Junction area during 1967. For example, an average of 40 cars a day moved between October 1 through October 14, 1967, and an average of 37 cars a day moved between January 14 through 27, 1967. From January 26 through January 27 and from October 1 through October 14, 1967, traffic clearances in excess of 30 minutes between Albina Yard and North Portland interchange occurred from about 4 to 11 times or an average of 7.5 times daily. There are four transfer SP trains handled daily at Albina Yard. About six UP trains move each way in addition to trains of

NP, GN, and SP&S over tracks north of North Portland or a total of about 55 trains daily use those tracks. About 30 minutes time should be required to operate a switch engine with a few cars over the cleared track segment between North Portland and Albina Yard. However, an average of about 30 hours has been required for the movement of SP cars and also those of UP between Albina Yard and North Portland. UP does not consider a 30-hour transit time adequate service and has endeavored to reduce the running time by the described consolidation of its Kenton-Terminal No. 4 terminal service, by the establishment of the above described central traffic control, by breaking trains at Seattle, Dow, Hinkle, and Pocatello to avoid switching at Albina Yard, and by increased operation through Sullivan Gulch.

There is a double track extending from the south end of Albina Yard to East Portland and the junction of the SP there. Even though traffic congestion exists at Albina Yard, UP nevertheless represents that it can provide Rivergate any service through Peninsula needed and represents that its present service in the involved area meets shippers' demands for service. The Steel Bridge crossing the Willamette River at East Portland is jointly owned by SP and UP. The bridge, as noted, allows UP and SP to connect with the tracks of the Portland Terminal Company, the Portland Yard, the SP&S Hoyt Street Yard, and the SP&S and NP Guild's Lake Yard, which permits SP to interchange traffic at the latter yard with SP&S or NP. Portland Terminal Company is a terminal switching company owned 40 percent by UP, 40 percent by NP, and 20 percent by SP.

UP, as noted, physically connects with Peninsula at North Portland, and interchange junction point and station on GN, NP, SP&S, and UP, within the Portland switching district. The physical interchange of line-haul traffic moving

by UP or its connections is performed by UP. On traffic moving to and from SP via SP&S, NP, GN, and UP from and to industries located on Peninsula, SP absorbs the Peninsula's rate division, and on traffic in which Milwaukee participates through joint routings, no switching charges are passed on to the shipper or consignee. UP expects to continue its policy of permitting line-haul carriers having no physical interchange with Peninsula to reach, through existing joint rates and routes, industries on the latter's line.

UP's position in supporting its application and in opposing the petitions for inclusion and applications for rights is that a grant of the UP-SP&S application would permit continuation of the Peninsula operation as a separate switching company by trunk line owners at North Portland interchange tracks and the joint operation of the freight station and yard there for their own traffic and an extension of the responsibility of these carriers for continuation of switching services at North Portland for other carriers. UP represents that management of Peninsula would become difficult and indecisive with four owners and that limited ownership would assure keeping the size of the yard facilities and costs of its operation at North Portland at a minimum. UP opposes the SP operation through Albina Yard principally because of congestion which it might create and believes the operation would result in uneconomical and wasteful conditions there. It represents that the operation of SP trains through Albina Yard is not practical because of the large number of trains already moving through the yard.

At the request of The Port and the Commissioner of Public Docks, a railroad conference was held at Portland on June 20, 1967, to consider elimination of non-competitive

switching charges to or from industries located on The Port's property at Swan Island (Albina) and Rivergate to encourage industrial development there. Thereafter, railroads participating in the conference agreed to establish a single basis of switching charges at all common points within Northern Idaho, Washington, and Oregon, with switching charges to be absorbed by the line-haul carriers where the line-haul minimum revenue is $100 a car after absorption, and no absorption of switching charges when specific tariff rate items are excluded. UP represents that when the agreement is implemented all industries within the Portland Switching District including The Port's Property area served by Peninsula, and points in North Pacific Coast Territory will be on a competitive relationship except for the two conditions noted. UP opposes the petitions of Milwaukee and SP and the SP applications because it represents that all industries located on Peninsula can be served adequately either directly or through applicable effective joint rates and through routes, under the UP-SP&S proposal. It desires to protect its existing traffic and facilities investment. However, a representative of UP indicates that the cost to Milwaukee for handling traffic moving to or from Peninsula with no access right there would be greater than that of UP. It is possible under the conference switching agreement that by payment of the UP or SP&S switching charge the minimum car revenue would be less than $100 resulting in payment of the switching charges by the shipper and refusal of the shipper to use Milwaukee's service. Also, on a shipment moving from a Peninsula industry to Arizona, routed UP from Peninsula interchange tracks to East Portland, thence SP beyond, SP would absorb the switching charge from Peninsula interchange to East Portland. The principal interest to UP in such a move would be the switch-

ing charge. UP generally has been unwilling to negotiate joint rates with Milwaukee between competitive points such as Spokane, Seattle, and Tacoma. Line-haul rates of carriers (but not all carriers) are applicable on traffic moving to or from Peninsula industries, and when line-haul rates are not applicable, the shipper or consignee must pay an extra switching charge.

The UP financial statement as of December 31, 1966, reveals total assets of $1,902,430,048, including current assets, $279,303,599, special funds, $819,004, investments, $479,073,070, properties less recorded depreciation and amortization, $1,136,364,928, and other assets and deferred charges, $6,869,447. Liabilities and shareholder equity include current liabilities, $117,797,009, long term debt due within one year, $17,757,016, long term debt due after one year, $199,999,694, reserves, $34,423,776, other liabilities and deferred credits, $28,293,827, capital stock, $299,292,350, capital surplus, $9,374,305, and total retained income, $1,195,492,071. The UP income statement for years 1962 through 1966 reveals among other things, total fixed charges of $9,104,258 in 1962 and $13,035,761 in 1966, and net income after fixed charges and other deductions transferred to retained income, unappropriate, for 1962, $80,550,226, and for 1966, $106,268,617. The total UP retained income, unappropriate, at the end of 1966 was $1,160,899,972.

SP, a class I railroad, operates over trackage generally extending (1) from Portland south through Eugene and Klamath Falls, Oreg., Sacramento, San Francisco, and Los Angeles, Calif., Phoenix and Tucson, Ariz., El Paso and Houston, Tex., to New Orleans, La., (2) from San Francisco through Sacramento, Calif., Reno, Fernley, Weso, and Alazon, Nev., to Ogden, Utah, and (3) from Fernley to Klamath Falls. Service over these tracks is rendered by SP at many

points south and east of Portland in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. At Portland, the northern terminus of SP tracks, as noted, connects with those of UP at an interlocking plant about 375 feet south of the eastern end of the UP-SP Steel Bridge across the Williamette River at Portland. SP maintains a large switching yard at Brooklyn known as the Brooklyn Yard about 2.6 miles south of the interlocker. Trains moving into Portland from the south over SP lines are generally sorted and blocked at Eugene, Oregon, about 125 miles south of Portland and move to Brooklyn Yard for further blocking if required before they are received by UP at East Portland. SP traffic to or from Peninsula moves principally over UP tracks from East Portland through Albina Yard, St. Johns Junction to the North Portland interchange tracks. In some instances SP traffic also moves from East Portland across the Steel Bridge to the Portland Terminal Company yard thence to Hoyt Street Yard for interchange with SP&S and movement over the SP&S main line tracks to North Portland interchange. The distance from Brooklyn over the UP tracks to Peninsula is about 8.59 miles. An SP engine and crew is used to move cars from Brooklyn through East Portland thence over the UP tracks to Albina Yard where they are received by UP for movement to Peninsula. The switch engine and crew of SP performs service from North Portland to Albina Yard as UP's agent. Similarly an SP switch engine and crew moves cars from Brooklyn over the alternate SP&S route to North Portland by operating as far as the Portland Terminal Company's yard where they are received by Portland Terminal Company, as an agent for the latter company. SP represents that if it is granted bridge trackage from the interlocker at East Portland to

Peninsula at North Portland interchange tracks its engines and crews can operate from Brooklyn to North Portland. About 2 hours switching time would be required for a SP engine and crew to operate between Brooklyn and Albina Yard and an additional 1.5 hours between North Portland and Albina Yard or a total of about 3 hours and 30 minutes. There are delays in the movement of traffic over the UP tracks between those points. A 10 percent random sample consisting of 42 cars (from a total of 410 cars) of SP traffic switched to and from Peninsula during 1967 in evidence reveals among other things an average of 32 hours and 10 minutes required for car movements from the SP interchange points to Peninsula when switched by UP or SP&S and an average of 55 hours and 16 minutes when moved from Peninsula to the SP interchange point. SP represents that 30 hours or more required for the movement of cars between Albina and North Portland interchange is excessive and that SP with bridge rights can provide faster service. From 25 to 57 trains, or an average of 40, move over the UP tracks between Albina Yard and North Portland each 24 hours. SP anticipates no operating difficulties or labor complication in connection with its proposed operation over the described UP North Portland-Brooklyn Yard tracks. During 1967 about 490 cars were moved between Brooklyn Yard and North Portland interchange tracks over the described routes. It further represents that the proposed operation of unit trains of iron ore over the described UP tracks to and from Peninsula is feasible.

SP proposes to provide service which will meet the shippers' transportation needs including a scheduled operation to and from Peninsula and to establish Portland rates which include service to and from Rivergate. Presently, local moves between Peninsula and many non-competitive Oregon

points require the payment of switching charges in addition to the rate to or from Portland. For example, four carloads of lumber moved during January, February, and April, 1967, by SP from Dallas, Springfield, Millersburg, and North Bend, Oreg., to Shefton Plywood Company, North Portland, for which separate switching charges were paid by the shipper. Such charges usually amount to $32.29 a car. SP absorbs switching charges in the Portland area if the circumstances justify, but does not absorb such charges on shipments from Oregon origins to Peninsula on low-rated non-competitive traffic. SP represents that Rivergate is unique in that it includes several thousand acres of publicly owned industrial land adjacent to a metropolitan area suitable for use by industries; that the successful development of that property depends upon the flexibility of rail service and that such service for the development involves major markets in California and other states served by SP.

The SP financial statement as of December 31, 1967, shows total assets $2,449,441,331, including total current assets, $223,519,955, total special funds, $1,490,344, net investments, $182,223,376, total properties less recorded depreciation and amortization, $2,028,866,435, and other assets and deferred charges, $13,341,221. Liabilities include current liabilities, $186,038,487, long-term debt due within 1 year, $45,704,211, long-term debt, $730,579,135, reserves, $10,234,715, other liabilities and deferred credits, $19,328,532, and total shareholders equity, $1,457,556,251. The SP retained income account as of December 31, 1967, reveals a credit balance of $1,032,681,210. The SP income account for the years ending December 31, 1966, and December 31, 1967, reveals among other things that for 1967 net railway operating income, $52,521,146, total other income, $39,927,418, miscellaneous deductions from income, $86,324,468, fixed charges, $31,607,107, and ordinary income, $54,717,361.

Milwaukee, a class I railroad, operates over main lines from Seymour, Ind., through Chicago, Ill., Minneapolis, Minn., Seattle and Tacoma, Wash., to Longview, Wash., a point on the Columbia River about 46 miles from Portland. Its main lines also extend from Chicago to Council Bluffs, Iowa, and to Kansas City, Mo. It serves the grain producing areas in Montana and eastern Washington and provides a connecting carrier service from those points to Portland. It also serves much of the forest products producing area in Idaho and Washington and industries in Tacoma, Seattle, Everett, and Bellingham, Wash., north of Portland. Also, service is rendered at the industrial cities, among others, of Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, Davenport, Rock Island, Moline and Bettendorf. At the time of hearing it performed no physical operations to and from the Portland area and was awaiting final disposition and consummation in *Great Northern Pac.—Merger—Great Northern, supra.* In that proceeding, the merger of GN, NP, Pacific Coast R. R. Company, and the Chicago, Burlington and Quincy Railroad Company into Great Northern Pacific & Burlington Lines, Inc., was authorized by the Commission in its report of November 30, 1967, subject to conditions set forth in Appendix "L" thereof, which among things, permits upon consummation of the transaction entry by Milwaukee into Portland and trackage rights between Longview Junction and Portland described above in connection with the evidence presented by SP&S. If the Milwaukee petition herein for inclusion is authorized it expects to operate fast trains between Chicago, Seattle, and Portland and between Portland and Sumas, Wash., with connection at the latter point with British Columbia railroads. However, such service cannot be established if terminal delays occur at Portland which offset the proposed

service advantages. Its proposed service at Portland includes physical operation of its equipment to and from the Peninsula interchange tracks at North Portland. All the industries on Peninsula would be served as on-line industries with no absorption of switching charges. Despite postponement of the effective date of consummation in the Northern Lines merger case pending consideration of various petitions, Milwaukee expects the merger will be confirmed and consummated within a reasonable time, and contingent upon its extension of operations to Portland, requests joint and equal ownership of Peninsula stock with other trunk lines and proposes to assume its share of the portion of the stock and indebtedness as set forth in the application. Its joint ownership is considered essential to its Portland operation to industries located on Peninsula and at Rivergate. Peninsula is the only terminal facility at Portland not owned by trunk lines presently serving that point.

Milwaukee has a centralized, computerized expedited service for tracing, reconsignment, and diversion of cars, and for the elimination of car delays. It owns 39,000 freight cars and in 1967 it transported 61,140 trailers in its trailer-on-flat-car service. It maintains facilities at various points for the loading and unloading of this type of traffic. Since 1963 it has maintained a 55.5 hour schedule service from Chicago to Seattle and 67.25 hour return. Milwaukee represents that if its request for joint ownership and direct access to Peninsula is denied and the northern lines merger consummated, Milwaukee traffic to North Portland would move to Guild's Lake Yard located about 6 miles south of North Portland, by Milwaukee and thence switched by other carriers from that point back to North Portland requiring an extra day in transit. It further represents that such de-

nial would place it at great disadvantage in competing in the Portland area because exclusive control by UP and SP&S of Peninsula would enable those carriers to fix the switching charges of Peninsula to be absorbed by Milwaukee or paid for by shippers; that those carriers could obtain trackage rights over the Peninsula lines because of their joint ownership; and could direct the service and switching to and from points on Peninsula tailored to meet operating conditions of the owner lines with lesser considerations for operations of Milwaukee. If Milwaukee's requests are granted, it expects to absorb the switching charges in the Portland area to the same extent that other carriers absorb them. It represents that the granting of its petition would take nothing of real importance from UP and SP&S because the real potential traffic lies in Rivergate's future development and that the purpose of its petition was to obtain assurance that it will not be foreclosed from serving Peninsula and Rivergate shippers.

Milwaukee is not owned or controlled by any other railroad and does not own or control any other parties to the instant proceedings directly or indirectly. Its officials and directors have no common interest in such parties to this proceeding. Milwaukee does own an interest in a number of other transportation companies not particularly pertinent to these proceedings.

As of December 31, 1967, the Milwaukee financial statement reveals total assets of $733,708,671 including current assets, $76,187,097, and special funds, $1,676,358, investments, $26,067,221, total property less depreciation and amortization, $625,512,008; other assets and deferred charges, $4,265,987. Liabilities include current liabilities, $54,060,146, long-term debt due within 1 year, $15,925,685, long term debt due after 1 year, $284,381,173, reserves, $1,448,596,

other liabilities and deferred credits, $4,085,187, and shareholder equity, $373,807,884. Its income account for the years ending December 31, 1963, to and including December 31, 1967, reveals, among other things, 1967 net railroad operating revenue, $11,439,385, other income, $17,177,970, fixed charges, $8,403,546, other deductions, $5,669,621, ordinary income, $2,733,925, prior period items, $10,222,000, and net income transferred to retained income unappropriated, $12,955,925. Its retained income statement for the years December 31, 1963 to 1967, inclusive, reveals a credit balance as of December 31, 1967 of $104,249,684.

COST STUDIES OF SP AND UP

SP presented cost study evidence to show (1) the estimated variable cost to SP for UP and SP&S to handle traffic between SP and Peninsula, (2) the estimated variable cost to SP for handling traffic to and from Peninsula, and (3) the estimated annual net effect on SP resulting from handling traffic directly to and from Peninsula instead of bridging via UP and SP&S. The study covers a proposed operation, and certain trackage assumptions, operating estimates of informed personnel, all known factors, and a 10 percent (42 cars) random sampling of 418 cars handled during 1967 by SP moved to and from Peninsula were relied upon for its preparation. The study shows a weighted average car cost (35 UP cars and 7 SP&S cars) of $44.27 to SP when UP and SP&S handled the traffic. Effective tariff charges of the involved carriers were used in this portion of the study. The second part of the study shows the estimated variable cost to SP when handling its own traffic between East Port-

land and Peninsula for 1 carload per round trip as $166.64, 5 carloads $12.93, 10 carloads $20.94, 15 carloads $15.53, and 20 carloads $12.93. The total of trackage, switching, and car rental costs were used in computing this portion of the study. The trackage costs are calculated upon a percentage of use by SP basis (0.58% for 1 carload round trip and varied increased percentages for greater numbers of cars), including 5 percent interest on reproduction costs, less depreciation ($5,360,000), estimated taxes ($22,000), and maintenance ($36,300). The use basis of computation was employed by assumption that the involved traffic would be a small percent of the total moved over that line and that a trackage arrangement similar to that used by SP in a Beaumont, Tex., arrangement would be applicable. An estimated round trip time of 205 minutes expanded 33 percent for nonproductive time and expanded and contracted for varying numbers of loads at $0.6755 average engine cost per minute was used in calculating the switching costs in this part of the study. The third part of the study, based upon the other two parts, reveals that for one carload round trip, if handled directly by SP, would result in an estimated annual net loss to SP of $44,600 and savings of $13,100 for 5 carloads, $85,200 for 10 carloads, $157,400 for 15 carloads, and $228,800 for 20 carloads, with a breaking point of 4.09 carloads a round trip.

UP presented similar cost study evidence which differed in three material respects, (1) the use of trackage cost based upon a numerical basis (described by UP as "user basis"[3]),

3. In *Missouri—K.—T. R. Co. v. Kansas City Terminal Co.*, 198 I.C.C. 4 at page 9, the Commission, Division 3, in its report states in part: Both petitioner and respondent conceded that just and reasonable compensation must include a reasonable return

that is, adjusted in relation to the number of users regardless of individual use, (2) use of the actual tax value ($122,000) on the involved property and maintenance, both computed on a "use" basis, and (3) use of a projection of the Portland Switching Study costs expected to be implemented during 1968. With these modifications, the UP study reveals (1) restated estimate of variable costs to SP by UP and SP&S handling of traffic between SP and Peninsula of $15.87 a carload weighted average (35 UP cars and 7 SP&S cars), (2) a restatement of estimated variable costs to SP for handling its own traffic from and to Peninsula for 1 carload round trip as $531.08, 5 carloads $109.55, 10 carloads $56.89, 15 carloads $39.30 and 20 carloads $30.63, and (3) a restated estimated annual net effect on SP resulting from its direct handling of traffic to and from Peninsula instead of using UP or SP&S connections, reflecting losses of $188,051 for 1 carload round trip, $170,965 for 5 carloads, $149,720 for 10 carloads, $128,280 for 15 carloads, and $107,740 for 20 carloads. Generally the studies of SP and UP differ substantially in their estimated annual net effects. In their preparation there was certain reliance upon estimates, at least one variation in the random sampling used, imponderables such as estimates and judgment factors used in calculations, and use of a 418 car frame (an unusually small number for most satisfactory results) from which a ten percent sampling was taken:

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upon the fair value of those zones of the terminal which petitioner has acquired the right to use. Two methods of computing that return are urged upon us. Petitioner urges the user basis, by which is meant that the petitioner should pay upon basis of the relation which its use of the terminal bears to the use of all the using carriers. This has been averaging somewhere in the neighborhood of 5 percent. Respondent urges the numerical basis, that is, adjustment in relation to the number of users of the terminal regardless of the extent of the individual use by those lines. As there are 11 users, petitioner's proportion under this basis would be one twelfth.

SHIPPERS' EVIDENCE

Zellerbach, the second largest producer of paper and paper articles in the United States and also a producer of industrial chemicals, has its principal manufacturing and shipping facilities located in the Portland area. It also has paper mills at Camas, Wash., and Wauna and West Lind, Oreg. It ships in excess of 1,100 carloads of the described commodities each month from the Portland area to various points throughout the United States. Zellerbach has or expects to establish four facilities in the Portland area. One is a distribution complex, Water Way Terminal Company, served by the Portland Terminal Company and Western Transportation. The latter is a certified water carrier owned by Zellerbach which has connections with a number of other carriers. At the time of hearing, Water Way Terminal Company facilities were being expanded and Zellerbach was negotiating for the purchase of a 1,500 water-front property located adjacent to Ashgrove Lime Company at the western end of Rivergate. The second is a pole yard located on 40 acres of land owned by Zellerbach at the eastern end of Rivergate. The pole yard, as noted, is served by Peninsula. The third facility is the planned construction of a 200,000 square-foot warehouse to be located on 44 acres of land purchased from Swift & Co. At the time of hearing the land purchase was waiting escrow clearance. The land is about 500 yards east of the SP&S main line at North Portland. The warehouse is expected to be used for the storing and distribution of products of the adjacent Zellerbach Flexible Packaging Division plant, the fourth facility.

During the 12 months ending November 30, 1967, 365 freight cars moved to or from the Flexible Packaging Divi-

sion plant and 638 freight cars (177 shipments) to and from the pole yard. The shipper's poles now move in 65-foot drop-end gondola cars supplied by the rail carriers. Sixty-four percent of the 177-pole shipments involved delays due to Zellerbach's inability to obtain suitable cars when needed. The delays ranged from 1 to 26 days, or an average of 4.5 days each.

Zellerbach supports each of the applications and petitions because authorization of the proposals would increase the number of carriers having direct access to Peninsula and increase its ability to obtain suitable cars, and because it desires service at its Rivergate facilities comparable to other transportation at Portland. It represents that such access could result in the elimination of a 22 degree curve in the present Peninsula tracks so that 85-foot pole cars can be accommodated thereon. Zellerbach represents that if SP had direct access to its pole yard, it would request that carrier's service more often. The Zellerbach representative could recall no instances in which it paid separate switching charges for service to and from its facilities located on Peninsula. Zellerbach indicates that the greater the number of connecting carriers required for handling a shipment the greater the number of rate divisions and cost of service.

Oregon Steel Mills, a division of Gilmore Steel Corporation of San Francisco, within the past 2 years has acquired 152 acres of Rivergate land where it is presently erecting a new steel plate mill. Several phases of construction of the mill are contemplated. The first phase cost is $35 million. Upon completion of the first phase mill, it will produce 200,000 tons of steel plate annually and upon completion of the entire mill the ultimate mill's capacity will be 700,000 tons. The mill site was located at Rivergate because it

affords room for the mill's expansion and for the location of related steel fabricating industries near it and because Rivergate is considered by this shipper as a transportation hub. There are presently steel plate mills located at Provo, Utah, and Fontana, Calif. The Rivergate mill will be the first producing steel plate mill located in the Pacific Northwest and its location will result in the establishment of a steel basing point at Portland, whereas up to this time the steel basing points have been at Provo and Fontana. Ore for use at the mill presently will be provided by Marconi Company transported by water carrier from Peru to Rivergate. However, Gilmore Steel Corporation owns large iron ore deposits near Mount Shasta, Calif., near a line of the SP. Arrangements are in progress for procuring iron ore at the Shasta location. Oregon Steel Mills expects to ship unit trains of ore from Shasta to the Rivergate mill and has obtained assistance and information respecting proposed transportation costs from SP, which in turn procured proposed costs of switching at Portland from UP. SP, prior to the filing of its applications, proposed to transport the shipper's ore from Shasta to the UP Portland interchange in SP equipment, including all terminal service charges at Shasta at $3.85 a gross ton subject to a tariff docketing proposal, and information received from SP respecting the proposed UP switching costs which was confirmed through the UP rate department was $.23 a gross ton from the UP-SP interchange at Portland to Rivergate. Oregon Steel Mills prefers a single train crew and through round trip unit train service. UP indicates it cannot provide this type of service at Portland because union contracts require the use of local power equipment and the payment of the Portland crew for a minimum work time. The shipper represents that it would start mining ore at Shasta as soon

as economically feasible, that its ore can move economically only in unit trains in the service of a single carrier with no connections and that it supports the SP applications to enable direct access to its Rivergate plant by SP through North Portland. The shipper is aware that major fill and track construction would be necessary before operation from Shasta through North Portland becomes possible. It indicates that Rivergate is being developed by use of public tax money and it believes direct access to Rivergate should be afforded through all rail carriers.

Williamette Wood Products, Inc., manufacturers stock for the manufacture of baby cribs at North Portland. Raw materials are shipped from Omak, Wash., to its plant by rail under an in-transit rate, where they are processed and shipped beyond. The shipper has used SP trailer-on-flatcar service for movements of its commodities beyond Portland to Los Angeles, Calif. Each week about one carload of the shipper's commodities are moved to or from North Portland. The shipper has relied upon service of SP&S, NP, GN, and UP and has no need for additional rail services or for additional terminal switching service at its plant. It supports the application of UP-SP&S and would like to have the continued service by the same railroad personnel at North Portland.

Morrison Oil Company operates a storage and packaging plant at North Portland and has relied principally upon SP&S for the provision of rail service to and from its plant. Each year it receives about 55 car loads of oil at the plant. It also receives cans and tires and antifreeze which move to the plant by truck. The antifreeze is shipped by water to Portland and moves locally by truck from St. Johns to Portland. This shipper's packaged products are shipped principally by truck and railroad from North Portland to points in Washington and Montana. Railroad shipments move from North Portland to the Butte-Missoula and Billings, Montana, area. This shipper supports the SP&S-UP

application because it believes that the acquisition will result in the continuance of present service which has been satisfactory and would assist it in developing additional business. However, the shipper admits that UP would not be particularly interested in its development of business at points in such states as Arizona, New Mexico, Texas, and Louisiana served by SP. The shipper was not aware that a shipment of its cans on October 10, 1967, from Ravenwood, Calif., routed SP-SP&S required 45 hours for movement from the SP interchange at Portland to Peninsula or that a shipment of cans on October 23, 1967, from Ravenwood, Calif., routed SP-UP to Peninsula required 37 hours for movement from the Portland UP connection to Peninsula.

Collier Carbon & Chemical Corporation, a Union Oil Company subsidiary, is constructing a new $2 million distribution facility north of the Ashrover Lime Company plant on the western side of Rivergate. The plant, to be in operation by the Fall of 1968, expects to use the direct service of SP, among other rail carriers, for the movement of its products from Rivergate. Urea, used in the manufacture of resins and fertilizer and as a cattle feed ingredient, is to be shipped by water carriers to the facility and to be reshipped by rail, truck, and water carriers to its customers. It is particularly interested in obtaining SP service for movements to western Oregon points and supports the SP applications because direct SP service would provide it suitable transportation to western Oregon points within provision of reasonable transit time, car availability, and rates. It has no preference as to the carrier switching its traffic to a belt-line or terminal company.

Serendip Industrial Materials of Portland, Oreg., supports the SP&S-UP application. It receives annually about 60 car loads of stone material at North Portland. The stone

is distributed to builders and metal refiners in the Portland area. Most of it is moved by GN from points in Washington and Canada although stone is also expected to be received from points east of Portland which would move by UP. This shipper has little interest in SP service, but if it receives stone from points south of Portland served by SP it would desire direct SP service to North Portland.

POSITIONS OF LABOR ORGANIZATIONS

Three of the eight labor organizations appearing in opposition to the applications and petitions presented evidence. The *Brotherhood of Railway Clerks of Portland Terminal Company* representing 300 employees of the latter company, particularly opposes the SP request for bridge trackage rights. The railway clerks maintain that the real purpose of SP is to enable its trains to bypass Portland Terminal Company and effect and interchange with SP&S, NP, or GN at North Portland instead of at the Portland Terminal Depot; that if bridge rights are granted, switching by Portland Terminal Company would decrease substantially; and that authorization of SP's request would result in increased traffic congestion on the involved UP track segment. This railway clerks organization has no objection to the proposal if limited to the interchange of Peninsula traffic at North Portland. It does not consider 30 hours transit time for the movement of cars from Albina Yard to North Portland reasonable.

The *Switchmen's Union of North America* is particularly interested in the welfare of 158 Peninsula Terminal Company employees. It opposes any grant of the applications or petitions permitting SP and Milwaukee to use interchange track facilities of Peninsula. It desires the continued handling of interchange traffic by Peninsula Terminal Com-

pany between SP and NP, GN, and SP&S and seeks employment security for its members. It maintains that services at Rivergate and North Portland are adequate. Starting in 1964 SP has on several occasions sought union assent to a change in the Portland interchange point for through trains from Portland Depot to a point north thereof.

The *Brotherhood of Locomotive Engineers of Union Pacific Railroad* opposes all of the applications and petitions and maintains that any grant thereof would affect engineer operations in the Kenton-Albina-East Portland-Barnes area. It maintains that the loss of even 1.5 car movements daily between East Portland and North Portland would reduce engine employees at Albina Yard. It desires maintenance of the status quo and represents that UP can provide all the involved services needed. However, objection by this organization to the SP&S-UP application to acquire Peninsula was withdrawn on brief, with a continuing objection to the SP and Milwaukee proposals. In the event of a grant of the latter carrier's proposals, it desires adoption by the Commission of employee protective conditions similar to those incorporated in an agreement entered into by the Brotherhood of Locomotive Engineers and Great Northern, Pacific and Burlington Lines, Inc., filed in Finance Dockets Nos. 21478 and 21480, as set forth in Appendix A to its brief filed June 17, 1968.

INTERVENERS' EVIDENCE

The Port's position is that Rivergate's development requires services of all the involved line-haul rail, barge, and ocean vessel carriers serving Portland with service at competitive rates, and that all the rail applicants should be afforded equal operating access to Rivergate. It expresses

a need for fast reliable freight service at Rivergate through Peninsula provided on equal terms by all present and future railroads serving Portland which can be accomplished by joint ownership. The Port desires the services of all the railroads to facilitate mechanized rapid handling of liquid and dry bulk commodities, containerized commodities, and other general freight between Rivergate and points throughout the United States. It asserts that single-car switching to and from small industries with so-called one-car sidings has become obsolete. Such switching is uneconomical because of engine and crew costs, and obsolete because trucks can more effectively perform a small shipment service.

The Western District Class I railroads traffic increased 36.2 percent in the 9 years following 1958. The Port's transportation consultant estimates that by 1990 traffic of those railroads will double, if adequate rail facilities are provided, and that Portland would share in its growth. Adequate facilities would include the most efficient mechanically fitted freight handling terminal with low freight handling costs possible through greater movement of intermodal traffic. After Rivergate's development, The Port estimates that from 500 to 600 cars or an average of 20,000 tons daily will move to and from the district; that daily service will require one unit train, one semi-unit train, one semi-unit trailer-on-flatcar (TOFC), train, two industry trains, and two switching runs, and that the types of service would include provision for (1) bulk commodity unit trains (never uncoupled), (2) semi-unit train service for handling the less mechanized traffic to move in blocks of 40 to 150 cars, (3) TOFC service, and (4) miscellaneous and switching service. Rivergate is represented as affording opportunity for use of new technology in rail terminal service by use of unit and

semi-unit trains, and the elimination of lost car movement time usually incurred at terminals. UP and SP&S, as noted, are the only carriers presently having direct access to Rivergate through the eastern and western entrances. The Port indicates that unless the four applicant railroads are afforded equal access to Peninsula its owners would crease unsatisfactory non-single-line switching conditions for the other lines; that unit train bulk traffic is impeded equally as much by switching delays as by traffic interchanges; that if Milwaukee traffic is switched by SP&S or UP before reaching Peninsula, Milwaukee's single-line efficiency to and from points in such States as Indiana and Iowa will be impaired; that if SP traffic is similarly switched, its single-line advantage to and from such points as Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans, and Memphis will be limited. The Port represents that existing uncorrelated transfer of freight cars within the Portland switching District will not meet Rivergate's rail service needs; that uncoordinated switching operations at Portland result in a minimum 24-hour transfer time, and sometimes 3 or 4 days for operations across the switching district compared to a few hours required for cross-city truck movements. Peninsula assertedly will be useful to Rivergate only if it can handle unit trains of 100 cars or more which Peninsula's track facilities presently will not accommodate.

Economic and statistical evidence relating to Rivergate presented by The Port's Research and Planning Department reveals, among other things, the following: The Columbia-Williamette system is the second largest river improvement project in the United States. The Federal Government and The Port together up to December 31, 1967, expended $120 million in improving the system. Ultimate public and private investment at Rivergate is ex-

pected to exceed $500 million. The Research and Planning Department is responsible for obtaining the described D.M.-J.M. commercial engineering Rivergate survey, report, and recommendations. The Port's long experience in marketing and research and its recognization of current technological transportation changes influenced its support of joint ownership of Peninsula by all the line-haul railroads serving Portland. The value of water-borne imports and exports in the Portland Custom District increased 313 percent from 1954 to 1966 compared to increases during that time of 201 percent at Los Angeles, 128 percent at San Francisco, and 132 percent at Washington ports. The Portland oceanborne traffic increased from 8,535,686 short tons in 1955 to 10,489,989 tons in 1965 or 22.9 percent.

The Portland Commission of Public Docks, City of Portland, favors joint ownership and operation of Peninsula and direct access to Rivergate by all line-haul railroads serving Portland. It is particularly interested in the transportation cost to shippers for movements to and from Rivergate, and asserts that non-competitive transportation costs there would preclude consideration by industries of Rivergate as an industrial site. The Commission represents that establishment of a $100 per car line-haul revenue minimum as proposed in the Conference of Railroad Presidents June 20, 1967, agreement to establish a single basis switching charge at competing Pacific Northwest points would adversely affect Rivergate shippers' interest without equal ownership by all the line-haul railroads in Peninsula. Railroads with no such interest for economic reasons would be required to assess switching charges, while owner-carriers subject to their own tariff provisions could absorb switching costs on the basis of a lower applicable car minimum revenue. Numerous illustrations of instances in which this

might occur are in evidence. For example, a non-owner carrier subject to the P.C.F.B. Tariff No. 35, I.C.C. 1098, Item 685, naming a rate on cans, fibreboard, set up, of 40.5 cents a hundredweight, 14,000 pound minimum weight, from Portland to Banks, Oreg., representing a minimum car revenue of $84.70 would be required to assess an additional charge while an owner carrier would absorb such a charge. Also, pointed out is the second exception to the proposed switching agreement which provides that switching charges will not be absorbed in instances where excluded by specific tariff provision.

The Public Utility Commissioner of Oregon favors joint ownership of Peninsula by all line-haul carriers serving Portland. Evidence presented by the Commissioner covers geographical and physical characteristics of the involved transportation area. It reveals, among other things, that in addition to the five major railroads, NP, GN, SP&S, UP, and SP presently serving the Portland area, 275 motor carriers operate to, from, or within Portland. Fifty-one of these carriers are regular-route general commodity carriers all authorized to serve Rivergate within the Portland commercial zone. Tables in evidence presented by the Commissioner show that the annual operating revenue of Peninsula has ranged from a high of $161,292 in 1956 to a low of $75,949 in 1963. Its averge revenue per car for switching service increased from $7.93 in 1950 to $27.71 in 1966. Peninsula's net operating income has ranged from $39,253 in 1955 to a deficit of $4,153 in 1962. While it operated at a deficit in 1962 and 1963 its income has since considerably improved. The Commissioner represents that the future need of Peninsula is closely related to development of Rivergate and the granting to SP and Milwaukee of direct access to Peninsula would provide present and future industries

served by Peninsula direct service by all line-haul railroads serving Portland.

Through rates and charges of SP&S, GN, NP and UP are presently applicable to industries served by Peninsula. SP does not interchange traffic at Peninsula and depends upon SP&S or UP switching service between the SP interchange at Portland (Union Station) or East Portland and the North Portland interchange. SP presently absorbs the switching charges on traffic moved to or from Peninsula subject to a per car minimum charge of $67 plus increases. Peninsula industries pay UP or SP&S for switching between North Portland and East Portland when the published through rates do not provide for absorption of the switching charges. For example, a switching charge is applicable to noncompetitive traffic originated by SP in Oregon moving to Peninsula.

DISCUSSION AND CONCLUSIONS

The issues here first require an understanding of the treatment to be afforded the involved Portland area, including land and transportation facilities of the public, of all types of carriers there, and of the shipping industries. Recognition of the public interest, the carriers' competitive efforts, and the present and future traffic pattern in the entire Portland area is required. They are directly related to the success or failure of trunk line operations there. Some indication exists that segmentized consideration would be appropriate. For example, considering the trackage between Albina Yard and North Portland as other than part of the UP Portland (Albina Yard) terminal facility. The factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity. Ob-

viously, divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth, and development of the Portland area. Therefore, judgments here are necessarily based upon consideration of the involved area as a whole.

The lead applications and related petitions were filed pursuant to sections 5(2) or 3(5) of the Interstate Commerce Act. Under section 5(2)(b), approval of requests for control and ownership such as those involved here must be predicated upon conditions which would promote interstate transportation in the best public interest. In *N. Y. Central Securities Co. v. U. S.*, 287 U.S. 12, the Supreme Court stated, at page 25, that "the term 'public interest' **** has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities ****."

Section 5(2)(c) of the Act contains the essentials for the Commission's consideration before a proposal thereunder may be authorized. These are (1) the effect of the proposed transaction upon adequate transportation service to the public, (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved in the proposed transaction, (3) the total fixed charges resulting from the proposed transportation, and (4) the interest of the carrier employees affected. Additionally, the public interest test is to be applied in light of the national transportation policy which includes the promotion of sound economic conditions and the development of a more efficient transportation system.

Section 5(2)(d) of the Act provides that:

> The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involv-

ing a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon finding that such inclusion is consistent with the public interest.

Section 5(2)(f) of the Act provides that:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(11) of the Act specifically relieves the applicants in transactions approved under section 5(2)(a) from operation of the antitrust laws and of certain other restraints, limitation, and prohibitions of law. However, the Supreme Court in *Seaboard Air Line R. Co. v. U.S.*, 154, 156, indicates that section 5(11) does not authorize the Commission to ignore the antitrust laws, but must estimate the scope and appraise the effects of curtailed competition which will result from the proposed acquisition and consider the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the overall transportation policy.

Section 3(5) of the Act provides in part:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including mainline track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced.

Also pertinent here is section 1(18) of the Act which provides in part:

> After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line or railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

The evidence justifies authorization of the proposed control in Finance Docket No. 24679 conditioned upon inclusion and equal ownership by SP and Milwaukee and the intervening trackage access to Peninsula by the latter two carriers, as set forth in the findings, and the conclusion that such control is in the public interest and would promote a sound transportation system. The Port, Public Utility Commissioner of Oregon, Portland Commission of Public Docks, and some industry representatives which presented evidence support joint equal ownership by all the line-haul railroads serving Portland. Existing disparity in charges and treatment of traffic within the Portland switching area is convincing evidence that the greatest economic advantage for equality of shippers and carriers can be accomplished

best by equal access and ownership. The most economical and functionally modern transportation facilities are essential to development of Rivergate and the Port of Portland. Limitation of direct access there to two railroads barring on-line solicitation and the direct development interests of the other railroads serving the Portland area is contrary to an environment of unencumbered development and the establishment of a sound transportation system. Each of the four railroads which request equal ownership in Peninsula are class I railroads with ample financial means for ownership participation and the sharing of cost for future betterments. Moreover, direct access to all the carriers will enable shippers to deal directly with originating carriers providing on-line service to many points in areas not served by the two initial applicants. Shippers would benefit from elimination of switching charges assessed on non-competitive traffic where one of the applicants now acts as a switching carrier.

No particular finding or further consideration here respecting fixed charges is required, except to say that evidence relating to the proposals reflects no increases in, or guarantee, or assumption of fixed charges which would require statutory action.

With respect to protection of employees' interests, authorization of the control proposals no doubt would result in some employee readjustments. However, the evident immediate effects of the proposals upon employees are minimal, and normal attrition would tend to dissipate them. At most, the immediate result would involve reassignment of switching crews for about 1.5 cars daily moving through Albina Yard, because responsibility for the move under the proposals would shift from UP to SP. One labor organization represents, in absence of documentary or statistical

support, that a change in the interchange point, of through traffic, from East Portland to North Portland would reduce operation of the Portland Terminal Company by as much as 50 percent. Actually, whether traffic moves through Albina Yard or through the Portland Terminal Company Yard in route to or from North Portland is by railroad management prerogative exercisable through carrier agreement irrespective of a determination here. Even though the effects are minimal, employees of the involved railroads, nevertheless, will be affected by authorization of the proposals, and action here is subject to, at least, the bare requirements of section 5(2). As noted, certain carrier-employee labor agreements of the involved railroads exist, but participants in these proceedings espouse no new agreements wherein conditions have been prescribed or agreed upon by the parties as permitted by the last sentence in section 5(2)(f). However, the Brotherhood of Locomotive Engineers, on brief, request the imposition of conditions similar to those contained in an agreement dated June 25, 1965, signed by it, and The Great Northern Pacific & Burlington Lines, Inc., used as a basis for prescribing protective conditions in the *Great Northern Pac.—Merger—Great Northern, supra,* proceedings. Aside from the prescription of bare minimum protective conditions in this proceeding as imposed in *Chicago & N. W. Ry. Co. Merger,* 261 I.C.C. 672 at 675, more detailed conditions are deemed unnecessary and are not recommended. Actually, the evidence affords assurance of increases in involved traffic movements, if ample transportation is provided, which would result in substantial overall public and employment benefits.

Evidence relating to the SP applications, Finance Docket Nos. 24890 and 24891, warrants a conclusion that common use by SP of the terminal facilities, including trackage, of

UP between Peninsula, at North Portland Interchange tracks, and the SP-UP connection at East Portland is in the public interest, practicable, and would not substantially impair UP's ability to handle its own business. The issue affording the greatest contest here is whether traffic conditions over and along UP trackage between East Portland and North Portland warrant the proposed SP operation. The record reflects substantial traffic movements over the UP trackage with congestion over the single track from St. John's Tunnel and in and around Peninsula Junction. Noted, is the almost incredible 30-hour average transit time required for car movements between Albina Yard and Peninsula, a round trip distance of about 10.4 miles, including engine changes, car inspection, and car classification at Albina Yard, which UP considers reasonable. Despite the congestion, there are times during each day when the single-line track through the tunnel to North Portland is clear and could accommodate additional traffic. UP asserts it is capable of providing the public all the service it needs presently, or will require, in the involved area. With no immediate appreciable increase in the involved traffic, the examiner is convinced that a grant to SP of the trackage rights would result in no significant increase in congestion on the involved UP track segment, and the user carriers through their joint efforts would be in a better position to overcome future traffic impediments as they occur. Actually, with SP cars being classified and inspected at Brooklyn Yard or Eugene, before movement by SP under the proposal directly through Albina Yard to North Portland and return in about 3.5 hours, no more and possibly less congestion should occur than at present. While UP has endeavored to relieve congestion in the Albina Yard area through various devices, the 30-hour transit time

remains unsatisfactory, and greater efforts in the public inferest must be found to expedite movements between those points. With the development of Rivergate and the requirements for substantial movements of traffic, including unit trains, to and from that area the examiner is convinced that access thereto by other line-haul carriers will create greater incentive for improvement of railroad facilities and for elimination of present unsatisfactory conditions in the involved area. Rather than perpetuate the existing unsatisfactory conditions, the advent of other carriers, the advent of other carriers would at least supply added carrier financial support and responsibility greatly favoring the public interest.

As noted, cost studies of both SP and UP introduced in evidence reflect great variance in the net effect of operations over the Albina-North Portland track segment involved here. The studies are significant only to the extent that they bear on the issue of public interest, and to the extent that they may affect compensation which might be paid UP for use of its involved trackage. The probative effect of the studies upon public interest is questionable because of variables in judgment and calculations used, or which might be used, in their preparation. Of interest, is the study basis of SP for determining compensation for use, that is, the relation which actual trackage use bears to total use by all users, compared to the basis used in the UP study, generally the payment in relation to the number of users irrespective of extent of use by any of the carriers. In this connection, the examiner observes that while the application in Finance Docket No. 24890, in part, contains a request for "bridge trackage rights" the application in Finance Docket No. 24891 specifies no particular type of trackage rights sought. In the best public interest any

authorization of proposed trackage rights should permit full user rights, with the attending assumption by the recipient thereof of entire use and responsibility and the payment of compensation therefor on a numerical basis. However, the amount of compensation for use of trackage rights recommended herein, is left to agreement by the involved carriers. Section 3(5) clearly reveals that after the right of a petitioner to use the terminal facilities of another carrier has been determined, the interested carriers shall have an opportunity to agree upon the terms and compensation for such use. In event of failure of the carriers to agree, they may petition the Commission to reopen the proceeding for further hearing for determination and prescription of terms and compensation. Jurisdiction will be retained for such purpose. See *Missouri - K. - T. - Ry. Co. v. Kansas City Terminal Co., supra* and *Use of Erie of Niagara Junction Ry. Co. Terminals,* 269 I.C.C. 493, 499.

Authorization of joint ownership and access by the four line-haul railroads in Peninsula, and the proposed trackage rights to SP would not curtail competition. To the contrary, shippers in the involved area would be afforded free direct access to all the line-haul carriers' services. Among other things, it would place traffic movements between the Portland area, on the one hand, and, on the other, on-line points of carriers in California and States east thereof, on a more competitive basis wi[redacted]ments between those points over the lines of UP and [redacted]onnections, through Wishram, Wash., Bend and [redacted] Oreg., and Bieber and Sacramento, Calif. Also, Milwaukee would become more competitive with UP and GN and their connections in providing service to the north and east of Portland. The authorizations, generally, would result in improved competitive service and the fostering of sound transportation in the involved area.

UP asserts on brief that extension of service by SP and Milwaukee as requested cannot be approved under section 3(5) or section 5(2) because the service each seeks to perform requires a finding that the present and future public convenience and necessity require extensions of their operations into the involved territory pursuant to section 1(18) of the Act. SP is certificated to operate from points south of Portland to East Portland, within the Portland Switching District, from which it serves, and has served, Portland through connections for many years. The Commission has ample power under section 3(5) to require use by SP of the involved UP terminal facilities and use of Peninsula facilities. However, the Comissimon has authority under section 5(2) upon petition by a carrier as prerequisite to approval of a proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved. This section contains authority for the inclusion of SP upon equal terms in the Peninsula purchase, for SP is a railroad "in the territory" providing service in the Portland area. Further certification of SP under section 1(18), aside from possible authorization of user rights under section 3(5), to operate to and from Peninsula, in the circumstances, is not required. The powers conferred by sections 3(5) and 5(2), collectively, provide ample authorization to permit that transportation which in the Commission's judgment, is best suited to public needs. As noted, Milwaukee's request for inclusion as an equal owner in Peninsula and the right of access thereto depends upon termination of litigation and consummation of the merger authorized by the Commission in *Great Northern Pac.—Merger—Great Northern, supra*, wherein Milwaukee, as pertinent, was granted trackage rights between Longview Junction and Portland, a distance of about 46 miles.

After consummation, Milwaukee will acquire trackage rights to enable operations between Longview Junction and Portland over the main line tracks of SP&S and SP including connection with the North Portland interchange tracks. Authority of the Commission in the granting of such trackage rights to Milwaukee in order to preserve the competitive conditions in the involved territory is not questioned. Whether such grant is sufficient to create another railroad in the Portland area within the meaning of section 5(2) without the further procuring of a certificate under section 1(18) is subject to question, for the Longview-Portland track is not part of a terminal facility and the trackage rights over this track segment actually create no certificated authority. However, the evidence adduced in the *Great Northern Pac.—Merger—Great Northern case* affords ample justification for issuance of such a certificate without further hearing, upon petition therefore. In view of the pendency of the described case, the examiner recommends authorization of control on an equal ownership basis by SP&S, UP, and SP on Peninsula with access thereto, subject to sale (upon consummation of the merger in the *Great Northern Pac.—Merger—Great Northern* proceeding) by those three carriers to Milwaukee of a one-fourth equal interest in Peninsula, including access trackage rights thereto. In event the parties elect not to consummate the purchase recommended herein further petitions by these carriers requesting access to and operation over trackage of Peninsula pursuant to section 3(5) of the Act may be filed. Jurisdiction will be retained for that purpose.

ULTIMATE FINDINGS AND ORDERS

In Finance Docket No. 24679 and in the related petitions dated August 23 and November 29, 1967, upon consideration

of all evidence of record, the examiner finds (1) that control of Peninsula Terminal Company by Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company, and the inclusion of Southern Pacific Company in such control, through purchase of all outstanding stock of Peninsula Terminal Company in equal shares and the additional equal contribution by each for payment of an unsecured $70,000 locomotive equipment open account owed by Peninsula Terminal Company to Union Stockyard Corporation, subject to sale by each, Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Southern Pacific Company, of a one-twelfth interest in Peninsula Terminal Company, including pro rate contribution for the locomotive equipment, to Chicago, Milwaukee, St. Paul and Pacific Railroad Company, conditioned (a) upon consummation of the merger transaction in the *Great Northern Pac.—Merger—Great Northern proceeding,* 331 I.C.C. 869, and (b) upon the filing by Chicago, St. Paul and Pacific Railroad Company of a request for certificate of convenience and necessity authorizing railroad operation between Longview Junction, Wash., and Portland, Oreg., upon the terms and conditions set forth herein, are just and reasonable, constituting a transaction within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent with the public interest, and (2) that the right of access by Southern Pacific Company and Chicago, St. Paul & Pacific Railroad Company, upon consummation of the transaction described in (1) above by one or both of these carriers, to Peninsula Terminal Company trackage over intervening North Portland interchange tracks, at North Portland, Oreg., presently owned individually or jointly by Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company,

Union Pacific Railroad Company, and Northern Pacific Railway Company, upon such terms and compensation for use of such intervening trackage mutually agreeable to the interested carriers, or in the event of failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act, such compensation to be paid or adequately secured before enjoyment of use thereof may be commenced, would be in the public interest, that operation pursuant to such right of access is practicable and would not substantially impair the ability of the owning carriers to handle their business; and that the application and petitions in all other respects should be denied.

In Finance Dockets No. 24890 and No. 24891, the examiner finds that common use by Southern Pacific Company of the railroad tracks and facilities of Union Pacific Railroad Company for operation between the Union Pacific Railroad Company-Southern Pacific Company track connection at East Portland, Oreg., and tracks of Peninsula Terminal Company at North Portland, Oreg., through Albina Yard, and Peninsula Junction, conditioned upon such terms and such compensation as Union Pacific Railroad Company and Southern Pacific Company may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act, such compensation to be paid or adequately secured before the enjoyment of use thereof may be commenced, would be in the public interest; that such operation is practicable and would not substantially impair the ability of Union Pacific Railroad Company to handle its business, and that the applications in all other respects should be denied.

In each of the proceedings the examiner further finds as a condition to the transactions authorized therein, that

during the period of 4 years from the effective date of the orders herein such transactions will not result in employees of the carrier or carriers by railroad affected by such orders being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such orders, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

ORDER

Premises considered, it is the ORDER of the hearing examiner in Finance Docket No. 24679, Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company—Control—Peninsula Terminal Company, in the petition of Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed August 23, 1967, and in the amended petition of Southern Pacific Company, filed November 29, 1967, that:

Acquisition of an equal interest by each, Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company, and the inclusion therein of Southern Pacific Company, of control of Peninsula Terminal Company, through purchase of the outstanding stock, and the sale by each of a one-twelfth interest in Peninsula Terminal Company to Chicago, St. Paul & Pacific Railroad Company, upon, and in event of, subsequent conditions be, and it is hereby, approved and authorized, subject to conditions set forth in the findings, and the application and petitions in all other respects are hereby, denied.

The authority to control, approved herein, may be exercised by Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Southern Pacific

independently of Chicago, St. Paul & Pacific Railroad Company, and if exercised, the first three named carriers shall submit for consideration and approval of this Commission three copies of the journal entries required to record the transaction.

In event subsequent conditions as set forth in the findings permit exercise of the authority herein, and such authority is exercised, by Chicago, St. Paul & Pacific Railroad Company, this carrier shall submit for consideration and approval of this Commission three copies of the journal entries required to record the transaction.

The right of access by one or both of Southern Pacific Company and Chicago, St. Paul & Pacific Railroad Company, upon consummation of the transaction described immediately above, to Peninsula Terminal Company over intervening North Portland interchange tracks of Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Northern Pacific Railway Company as described in the findings herein, be, and it is hereby, approved and authorized subject to the conditions set forth in the findings and orders.

Within 90 days from the effective date of this order, Southern Pacific Railroad Company, Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company, and Northern Pacific Railway Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the use of North Portland interchange trackage, with provisions for possible inclusion of Chicago, St. Paul & Pacific Railroad Company in such agreement within 1 year from the effective date of this order, and in event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

Northern Pacific Railway Company, one of the owners of Spokane, Portland & Seattle Railway Company, be, and it is hereby declared to be a party to these proceedings for the purpose of participation in trackage agreements described in this order.

The authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 1 year from the date of such notice or order, or within any extension thereafter ordered by the Commission, this order shall be of no further force and effect.

The jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 2 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate.

The recital of balance sheet and other financial data shall not be construed as approval of accounting methods which have been followed, or expenditures represented thereby.

By the Commission, Samuel C. Shoup, Hearing Examiner.

Dated at Washington, D. C., this 9th day of September, A. D. 1968.

(SEAL)

H. NEIL GARSON,

Secretary

ORDER

Premises considered, it is the ORDER of the hearing examiner in Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Ter-

minal Co., and in Finance Docket No. 24891, Common Use of Certain Terminal Facilities—Union Pacific Co., that the request therein for common use by Southern Pacific Company of the railroad tracks and facilities of Union Pacific Railroad Company as described in the findings herein, be, and it is hereby, approved and authorized subject to the conditions set forth in the findings and order herein; and that the applications in all other respects are denied.

Within 90 days from the effective date of this order the Union Pacific Railroad Company and the Southern Pacific Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the use of tracks and terminal facilities herein authorized; and in event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

The authority herein granted shall not be exercised prior to the date of service of the order adopting this recommendation as the order of the Commission, or of a notice stating that this recommended order has become the order of the Commission.

The jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 2 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate.

By the Commission, Samuel C. Shoup, Hearing Examiner.

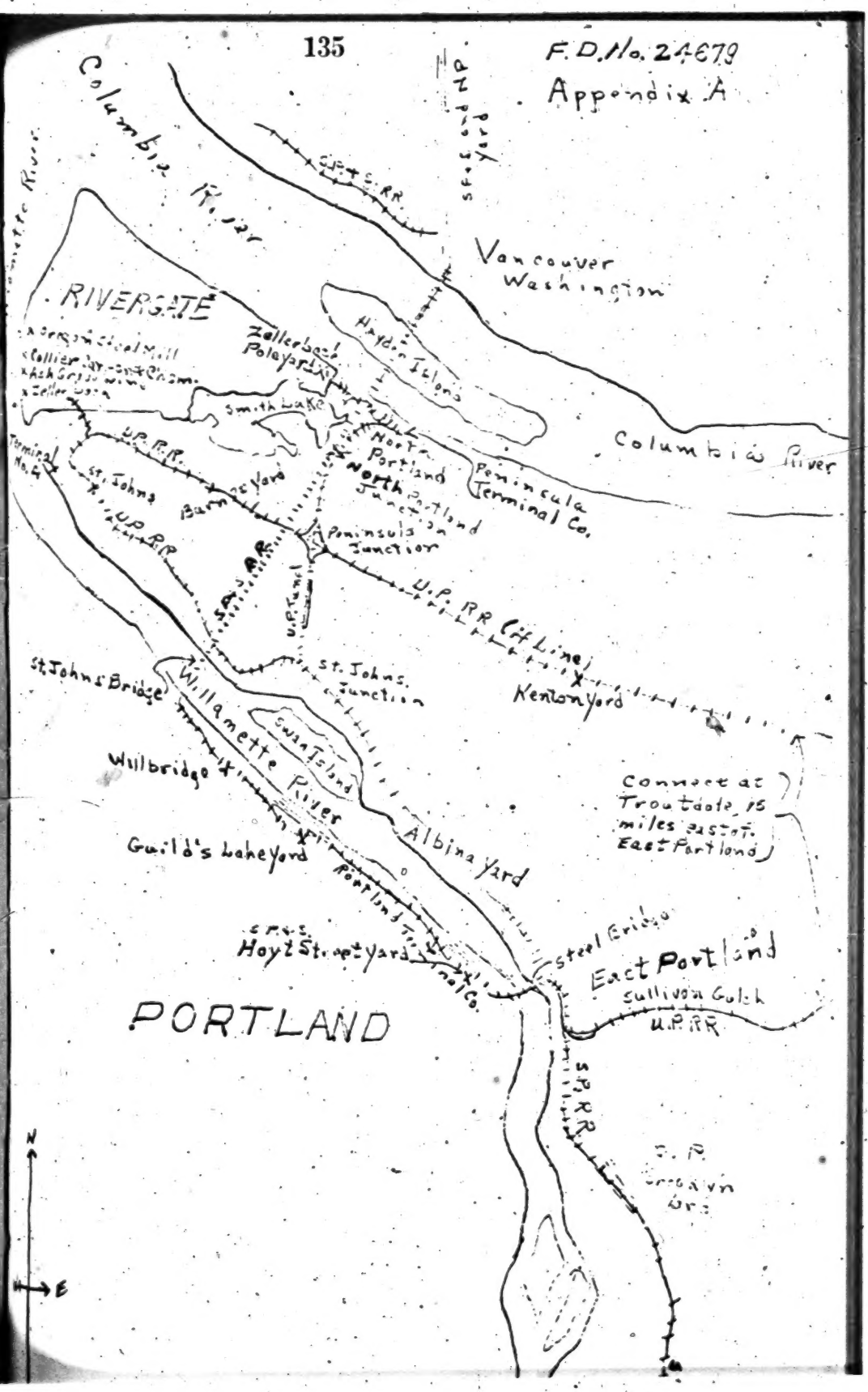
Dated at Washington, D. C., this 9th day of September, A. D. 1968.

(SEAL)

H. NEIL GARSON,

Secretary

F.D. No. 24678
Appendix A



APPLICATION OF SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY UNDER SECTION 5(2) OF THE INTERSTATE COMMERCE ACT, FOR AUTHORITY TO ACQUIRE CONTROL OF PENINSULA TERMINAL COMPANY THROUGH OWNERSHIP OF ALL OF ITS OUTSTANDING CAPITAL STOCK.

Spokane, Portland and Seattle Railway Company (SP&S) and Union Pacific Railroad Company (Union Pacific) sometimes herein referred to jointly as "Applicants" hereby apply to the Interstate Commerce Commission (Commission) under Section 5(2) of the Interstate Commerce Act for authority to acquire control of Peninsula Terminal Company (Peninsula) through ownership of all of Peninsula's capital stock presently owned by United Stockyards Corporation (United).

Pursuant to the provisions of Part 52 of Title 49 of the Code of Federal Regulations, Applicants state:

52.2

(a) *Identification of applicant, or of each applicant, if there are two or more applicants, showing:*

(a)1. The full and correct name and the business address of each of the applicants are:

Spokane, Portland and Seattle Railway Company,
1112 American Bank Building,
621 S. W. Morrison Street,
Portland, Multnomah County, Oregon 97205.

Union Pacific Railroad Company,
1416 Dodge Street,
Omaha, Douglas County, Nebraska 68102.

(a)2. Applicants are corporations and each is doing business under its foregoing respective corporate name.

(a)3. Applicants are carriers by railroad, subject to Part I of the Interstate Commerce Act.

(a)4. SP&S owns and operates properties situated in the states of Oregon and Washington.

Union Pacific owns and operates properties situated in the states of California, Colorado, Idaho, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, Washington and Wyoming.

Peninsula owns and operates properties situated in the state of Oregon.

• • •

(a)6. Both Applicants were organized as common carriers by railroad before the enactment of the Transportation Act of 1920 and have been continuously so engaged to the present date. Accordingly, Applicants have not been required to procure authorization from the Commission to engage in interstate or foreign commerce as a carrier by railroad.

Peninsula has been authorized to engage in interstate or foreign commerce as a terminal switching railroad in Multnomah County, Oregon, by Certificate and Order issued October 18, 1930, in Finance Docket No. 8389, 166 ICC 597.

(b) *Information respecting Applicant, or each Applicant if there are two or more applicants, as follows:*

(b)1(i). SP&S is a corporation organized under the laws of the State of Washington, on August 23, 1905, under the name of Portland and Seattle Railway Company. The

name of the corporation was changed to Spokane, Portland and Seattle Railway Company on February 1, 1908. SP&S was authorized to do business in the State of Oregon on October 14, 1905. Union Pacific was incorporated in Utah on July 1, 1897, and was authorized to do business in the State of Oregon July 30, 1932.

• • •

(c) *Information respecting the nature of the transaction proposed and the terms and conditions thereof as follows:*

(c)1. The proposed transaction is the acquisition of control of Peninsula Terminal Company by SP&S and Union Pacific through the purchase of all of Peninsula's outstanding capital stock from its present owner, United Stockyards Corporation.

(c)2. The stock of Peninsula Terminal Company will be sold to Applicants for a purchase price of $299,405, adjusted to reflect certain changes in the value of the property of Peninsula, occurring between February 28, 1967, and the closing date. Each applicant will purchase one-half of the outstanding shares and will pay one-half of the agreed price therefor.

The closing will take place in Portland, Oregon, not later than the first day of the month following the month in which an order of the Commission which approves the sale, and which, if conditional, has been accepted by the parties to the sale, becomes final.

The terms of the sale shall be cash, to be paid in full upon the closing date and upon the delivery of all of the outstanding stock of Peninsula to the Applicants.

(c)3. There are no financial or other relationships, direct or indirect, not disclosed in the foregoing responses, existing at the present time between Applicants and Peninsula or United, with exception of:

Agreement between Peninsula, Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company and SP&S, dated August 31, 1938, covering construction, maintenance and operation of interchange tracks at North Portland, Oregon as supplemented and amended by agreements between the same parties dated April 10, 1952, and May 2, 1955.

Agreement between Peninsula, SP&S and Union Pacific Railroad Company, 1936, Car Hire.

Permit to construct single track railway across and under lines of SP&S dated September 20, 1909 to Union Meat Company assigned to Swift & Company May 31, 1919 and further assigned to Peninsula October 29, 1936.

Agreement of January 29, 1917 between Northern Pacific, SP&S and Peninsula Industrial Company concerning fill to be placed under trackage of Applicant by Peninsula Industrial Company supplemented July 31, 1918 to provide for change in location of roadway opening, and assigned to Peninsula on September 9, 1940.

Agreement dated September 7, 1954, between Peninsula, Oregon-Washington Railroad & Navigation Company, SP&S and Swift & Company regarding easement on land for a building to house car inspector and yard clerk.

(c)4. Peninsula's main track extends westward from North Portland Junction a distance of 0.63 miles and eastward from said point a distance of 0.69 miles, with some 2.47 miles of secondary and spur tracks between these limits making a total of 3.79 miles of track as shown in Exhibit 6.

(c)5. The proposed transaction involves the purchase of all of the outstanding capital stock of Peninsula and therefore all of its property.

(c)6. It is Applicants' understanding that the Commission has accepted a valuation of the properties of Peninsula on the basis of historical book cost. A detailed statement of the cost, less depreciation, of Peninsula's properties as of February 28, 1967, is attached hereto as Exhibit B to Exhibit 7. As shown in such exhibit, this net cost is $196,938.31. No additions and betterments have been made since February 28, 1967.

Peninsula employed the American Appraisal Company to value its properties as of November 30, 1962. Based upon that appraisal, Peninsula established the following valuation as of February, 1963, for the purpose of the sale of its properties:

Land 13.17 acres at $8,125 per acre	$107,000
Roadway, structures and equipment less observed depreciation and exclusive of locomotives	163,100
Locomotives	19,517
Inventories and supplies	1,593
Total	$291,210

A more detailed summary of the valuation by American Appraisal is attached hereto as Exhibit 14.

Net additions and betterments to Peninsula's properties between February, 1963, and February 28, 1967, are as follows:

Net additions, betterments and retirements February 1963 to February 28, 1966	$ 7,575.00
Net additions February 28, 1966 to February 28, 1967 (including one 70-ton diesel locomotive and one 50-ton diesel locomotive)	67,311.00
	$ 74,886.00
Less:	
Two retired steam locomotives as included in previous proposal	19,517.00
Current liabilities in excess of current assets	47,174.00
	66,691.00
Net	$ 8,195.00

Thus the appraised value of Peninsula's outstanding stock for the purpose of the sale is:

Valuation February 1963	$291,210.00
Net additions and betterments to February 28, 1967	8,195.00
Total	$299,405.00

(c)7. Applicants and Peninsula accrue depreciation in accordance with accounting rules prescribed by the Commission. The rates by classes of property are shown in their reports to the Commission.

(c)8. The 1,500 shares of outstanding stock of Peninsula are owned entirely by United. Hence there is no ascertainable market value of such shares. The estimated value per share is $199.60 based upon the selling price of

$299,405, to be adjusted as provided in the contract to purchase, which selling price in turn is based upon the appraised value described in paragraph (c)6 hereof.

(c)9.

(i) One 70-ton diesel locomotive and one 50-ton diesel locomotive were sold to Peninsula by United in 1966.

(ii) The purchase price of $70,000 is still due and payable by Peninsula to United with no maturity date and no accrued interest. It is carried on the books of Peninsula as an unsecured account payable.

(iii) Applicants have agreed with United that at the time of closing the contract for sale of Peninsula's outstanding stock, they will each pay to Peninsula $35,000 as a contribution to capital. Applicants and United have also agreed that promptly after closing, the Applicants will cause Peninsula to use said contribution to capital for the purpose of paying said account payable to United in full without interest.

(c)10. Not applicable, no consolidation or merger is proposed.

(d) *Facts and circumstances relied upon to show that the proposed transaction is within the scope of Section 5(2)(a) of the Interstate Commerce Act, will be consistent with the public interest, and will otherwise be within the requirements of Section 5, particular:*

(d)1. In case of any proposed transaction:

(i) The transaction covered by the application will be consistent with the public interest. As shown on Exhibit 6 attached hereto, the River Gate Industrial Area in North Portland being developed by The Port of Portland Commission lies approximately one-half mile to the west

of Applicant's physical connection to Peninsula. The northeasterly portion of said area is now reached by the western terminus of the tracks of Peninsula, and proposed acquisition will enable Applicants to provide rail service to said industrial area over the lines of Peninsula.

(ii) The terms of the agreement between the owner of Peninsula stock and Applicants were arrived at through arm's length bargaining and there is unanimous agreement by the parties on said terms.

If the proposed acquisition is authorized, Applicants intend to continue the operations of Peninsula as a separate carrier. It is not presently possible to indicate any specific economies to be effected through control by Applicants of Peninsula.

No major changes in traffic or revenues are anticipated in the immediate future; however, it is anticipated that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of the said River Gate Industrial Area by The Port of Portland Commission.

Applicants are of the opinion that their operation of said company will be to the mutual benefit of the three carriers and will be consistent with the public interest.

(iii) Control by Applicants of Peninsula will assure the territory served by that company of continued adequate rail transportation.

(iv) There will be no increase in fixed charges.

(v) Applicants intend to continue the operation of Peninsula as a separate carrier with present Peninsula employees so that the proposed acquisition will have no adverse effect on such employees.

(vi) No guaranty or assumption of payments of dividends or fixed charges is contemplated in the proposed transaction.

(d)2. Also, if the proposed transaction involved a railroad:

(i) The public interest is not adversely affected as Applicants are the only railroads connecting with Peninsula and all routes and channels of trade via existing junctions and gateways will be maintained.

(ii) Applicants have no objection to the Commission's prescribing conditions for the protection of employees on the same basis as set forth in *Chicago & N. W. Ry. Co. Merger*, 261 ICC 672.

* * *

WHEREFORE, Applicants pray that the Commission issue its order or orders authorizing Applicants under Section 5 of the Interstate Commerce Act to acquire control of Peninsula through acquisition of all of the issued and outstanding capital stock of Peninsula and issue such other order or orders and make such other findings as may be appropriate in the premises.

Dated: At St. Paul, Minnesota, this 18th day of July, 1967, and

At Omaha, Nebraska, this 21st day of July, 1967.

* * *

EXHIBIT 7 TO SP&S/UP APPLICATION

CONTRACT TO PURCHASE

THIS AGREEMENT, made and entered into as of February 28, 1967, by and between Spokane, Portland and Seattle Railroad Company, a Washington corporation, and Union Pacific Railroad Company, a Utah corporation (hereinafter called "Buyers"), and United Stockyards Corporation, a Delaware corporation (hereinafter called "seller"),

WITNESSETH:

Seller owns all of the outstanding capital stock of Peninsula Terminal Company, an Oregon corporation (hereinafter called "Peninsula"). Peninsula and Buyers are common carriers by railroad, subject to Part I of the Insterstate Commerce Act.

Seller wishes to sell and Buyers wish to purchase all of the outstanding stock of Peninsula subject to the terms of this agreement.

NOW, THEREFORE, it is agreed by the parties hereto as follows:

1. *Sale of Stock; Contributions to Capital.*

(a) Subject to the approval of the Interstate Commerce Commission, Seller sells to each of the Buyers one half of all of the outstanding shares of common stock of Peninsula for a purchase price of $149,702.50 to each of the Buyers, and Buyers, subject to the approval of the Interstate Commerce Commission and in reliance upon the representations and warranties of Seller contained herein, and subject to the terms and conditions of this agreement,

shall purchase such shares from Seller. The purchase price shall be increased or decreased at the time of closing by the amount (rounded to the nearest even dollar) by which the total Peninsula stockholders' equity on the closing date exceeds or is less than $157,504.00, which is the amount of the total stockholders' equity (rounded to the nearest even dollar) as of February 28, 1967, as shown in Exhibit A hereto.

(b) Seller has heretofore sold a Peninsula one 70-ton diesel locomotive and one 50-ton diesel locomotive for a total purchase price of $70,000. This indebtedness is an unsecured account payable by Peninsula to Seller and is so carried upon the books of Seller. Each of the Buyers agrees that at the time of closing it will make a contribution to the capital of Peninsula in the amount of $35,000. Promptly after the closing Buyers agree to cause Peninsula to use said contributions to capital for the purpose of paying said account payable to Seller, in full, without interest.

3. *Closing.*

The closing date hereunder shall be not later than the first day of the month following the month in which an order of the Interstate Commerce Commission which approves this sale and which, if conditional, has been accepted by the parties hereto, becomes final. The closing shall take place in Portland, Oregon. At the closing, Seller shall deliver to each of the Buyers, free and clear of all encumbrances, certificates for one half of all the outstanding shares of stock of Peninsula negotiable form, with all requisite stock transfer stamps attached. Upon such delivery, Buyers, subject to the terms and conditions

hereof, will deliver to Seller their checks for their share of the total purchase price, payable to the order of the Seller. At the closing, each Buyer will deliver to Peninsula its check payable to the order of Peninsula in the amount of $35,000 in payment of the contributions to capital described in paragraph 1(b) hereof.

3. *Representations and Warranties.*

Seller represents and warrants as follows:

(a) *Organization and Standing of Peninsula.*

Peninsula is a corporation duly organized, validly existing and in good standing under the laws of the State of Oregon. A copy of Peninsula's Articles of Incorporation and all amendments thereto, to date, certified by the Corporation Commissioner of the State of Oregon, and a copy of Peninsula's Bylaws, as amended to date, certified by Peninsula's secretary, which have been delivered to Buyers, are complete and correct as of the date of this agreement. Peninsula is not authorized to do business in any state other than Oregon.

(b) *Subsidiaries.*

Peninsula has no subsidiaries.

(c) *Capitalization.*

Peninsula's entire authorized capital stock consists of 2,500 shares of common stock of the par value of $100 per share, of which 1,500 shares are issued and outstanding. All such shares have been validly issued and are fully paid and nonassessable.

(d) *Stock Ownership.*

Seller represents and warrants that it is the owner, free and clear of any encumbrances, of all of the outstanding shares of stock of Peninsula.

(e) *Financial Statements.*

Attached hereto, marked Exhibit A, is a balance sheet statement showing the condition of Peninsula as of February 28, 1967. Seller warrants that this statement is true and correct and has been prepared in accordance with generally accepted accounting principles, and accurately reflects the operation of Peninsula. Seller will prepare, or cause to be prepared, and deliver to Buyers, at the time of closing, a balance sheet statement showing the condition of Peninsula at the time of closing. In preparing such balance sheet the same accounting practices shall be used as were used in preparing Exhibit A.

(f) *Absence of Undisclosed Liabilities.*

Except to the extent reflected or reserved against in Peninsula's balance sheet of February 28, 1967, Peninsula, as of such date, had no liabilities of any nature, whether accrued, absolute, contingent or otherwise, including without limitation, tax liabilities due or to become due, and whether incurred in respect of or measured by Peninsula's income for any period prior to February 28, 1967, or arising out of transactions entered into, or any state of facts existing, prior thereto. Seller represents and warrants that it does not know or have reasonable grounds to know of any basis for the assertion against Peninsula, as at February 28, 1967, of any liability of any nature or in any amount not fully reflected or reserved against in the balance sheet of February 28, 1967.

(g) *Absence of Certain Changes.*

After February 28, 1967, there shall not be

(1) any change in Peninsula's financial condition, assets, liabilities, or business, other than changes in the ordinary course of business, none of which being materially adverse;

(2) any damage, destruction or loss, whether or not covered by insurance materially and adversely affecting Peninsula's properties or business;

(3) any declaration, or setting aside, or payment of any dividend or other distribution in respect of Peninsula's capital stock, or any direct or indirect redemption, purchase or other acquisition of any of such stock;

(4) any increase in the compensation payable or to become payable by Peninsula to any of its officers, employees or agents, or any bonus payment or arrangement made to or with any of them; or

(5) any labor trouble, or any event or condition of any character, materially and adversely affecting Peninsula's business or prospects.

(h) *Title to and Condition of Properties.*

Attached hereto, marked Exhibit B, is a list and description of Peninsula's real and personal properties which are reflected in the balance sheet of February 28, 1967. Peninsula has good and marketable title to all its properties and assets, real and personal, including those reflected in the said balance sheet of February 28, 1967 (except as since sold or otherwise disposed of in the ordinary course of business), subject to no mortgage, pledge, lien, conditional sale contract, encumbrance or charge, except for minor imperfections of title and encumbrances, if any, which are not substantial in amount, do not materially detract from the value of the properties subject thereto, or materially impair Peninsula's operations, and have arisen only in the ordinary course of business. All buildings and equipment of Peninsula are in reasonable condition and

repair, and substantially unchanged from February 28, 1967, and in conformity with all applicable ordinances and regulations, and building, zoning and other laws.

(i) *Contracts*

Peninsula has no presently existing contract or commitment extending beyond the 31st day of December, 1967, or involving payment by Peninsula of more than $1,000, except as listed in Exhibit C attached hereto and by this reference made a part hereof.

Peninsula has complied with all the provisions of such instruments and all other contracts and commitments to which it is a party and is not in default under any of them.

(j) *Directors and Officers; Compensation; Bank.*

Seller has delivered to Buyers a true and complete list, as of the date of this agreement, certified by Peninsula's treasurer, showing:

(1) the names of all Peninsula's directors and officers;

(2) the names of all administrative and executive personnel, together with a statement of the full amount paid or payable to each such person for services rendered or to be rendered in 1967, and the basis therefor;

(3) the name of each bank in which Peninsula has an account or safe deposit box, and the names of all persons authorized to draw thereon, or to have access thereto; and

(4) the names of all persons holding powers of attorney from Peninsula, and a summary statement of the terms thereof.

(k) *Litigation.*

Except for suits of a character incident to the normal conduct of Peninsula's business and involving not more than $500 in the aggregate, there is no litigation or proceeding pending, or to the Seller's knowledge threatened, against or relating to Peninsula, its properties or business, nor does the Seller know or have reasonable grounds to know of any basis for any such action, or of any governmental investigation relative to Peninsula, its properties, or business.

(l) *Disclosure.*

No representation or warranty by the Seller in this agreement, nor any statement or certificate furnished or to be furnished to the Buyers pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact necessary to make the statements contained therein not misleading.

4. *Access and Information.*

Seller shall cause Peninsula to give to Buyers and to Buyers' counsel, accountants, engineers and other representatives, full access, during normal business hours throughout the period prior to the closing, to all of Peninsula's properties, books, contracts, commitments, and records, and shall furnish the Buyers during such period with all such information concerning Peninsula's affairs as the Buyers reasonably may request.

5. *Conduct of Business During Closing.*

Seller covenants that, pending the closing:

(a) Peninsula's business will be conducted only in the ordinary course.

(b) No change will be made in Peninsula's certificate of incorporation or bylaws, except as may be first approved in writing by Buyers.

(c) No change will be made in Peninsula's authorized or issued capital stock.

(d) No dividend or other distribution or payment will be declared or made in respect of Peninsula's capital stock.

(e) No change will be made in the compensation payable or to become payable by Peninsula to any officer, employee or agent, nor will any new bonus payment or arrangement be made by Peninsula to or with any officer, employee or agent thereof.

(f) No money will be borrowed by Peninsula without the prior written approval of the Buyers.

(g) No contract or commitment will be entered into by or on behalf of Peninsula extending beyond December 31, 1967, except normal commitments, which in any single case will not involve payment by Peninsula of more than $1,000.

(h) No change will be made affecting the personnel or banking or safe deposit arrangements referred to in subparagraph (j)(3) of paragraph 3 without the Buyers' prior written approval.

(i) Except as otherwise requested by Buyers, the Seller will cause Peninsula to use its best efforts (without making any commitment on the Buyers' behalf) to preserve Peninsula's business organization intact; to keep available to Peninsula the services of its present officers and employees; and to preserve for Peninsula the goodwill of its suppliers, customers and others having business relations with Peninsula.

6. *Conditions Precedent.*

All obligations of the Buyers under this agreement are subject to the fulfillment, prior to or at the closing, of each of the following conditions:

(a) *Representations and Warranties True at Closing.*

Seller's representations and warranties contained in this agreement shall be true at the time of closing as though such representations and warranties were made at such time.

(b) *Performance.*

Seller shall have performed and complied with all agreements and conditions required by this agreement to be performed or complied with by it prior to or at the closing.

(c) *Officers' Certificate.*

Seller shall have delivered to the Buyers a certificate of Peninsula's president and treasurer, dated the closing date, certifying in such detail as the Buyers may specify to the fulfillment of the conditions specified in subparagraphs (a) and (b) of this paragraph.

7. *Indemnification.*

Seller shall indemnify and hold harmless Peninsula and the Buyers at all times after the date of this agreement, against and in respect of

(a) all liabilities of Peninsula of any nature, whether accrued, absolute, contingent or otherwise, existing at February 28, 1967, to the extent not reflected or reserved against in full in Peninsula's balance sheet of that date, including, without limitation, any tax liabilities to the extent not so reflected or reserved against, accrued in respect of, or measured by Peninsula's income for any period prior

to February 28, 1967, or arising out of transactions entered into, or any state of facts existing, prior to such date;

(b) all liabilities of, or claims against, Peninsula arising out of the conduct of Peninsula's business between February 28, 1967, and the closing otherwise than in ordinary course, or arising out of any presently existing contract or commitment of the character described in subparagraph (i) of paragraph 3 and not listed therein, or arising out of any contract or commitment entered into or made by Peninsula between the date hereof and the closing except as permitted by the provisions of subparagraph (g) of paragraph 5;

(c) any nonpayment on demand, when due, following the closing, on any of the accounts receivable of Peninsula existing on the closing date;

(d) any damage or deficiency resulting from any misrepresentation, breach of warranty, or nonfulfillment of any agreement on the part of Seller, under this agreement, or from any misrepresentation in or omission from any certificate or other instrument furnished or to be furnished to the Buyers hereunder; and

(e) all actions, suits, proceedings, demands, assessments, judgments, costs and expenses incident to any of the foregoing. Seller shall reimburse Peninsula or the Buyers, on demand, for any payment made by Peninsula or either of the Buyers at any time after February 28, 1967, in respect of any liability or claim to which the foregoing indemnity relates.

After the closing date, Buyers will cause Peninsula to cooperate with Seller in connection with Seller's assumption or defense of the liabilities described in subparagraph (a) of this paragraph

8. *Interstate Commerce Commission Approval.*

Buyers will promptly prepare and file with the Interstate Commerce Commission an application for an order approving this sale. The parties hereto will, at their own separate expense, cooperate in the preparation, filing and prosecuting of the application, and in preparing for and participating in any hearings or other and further administrative or court proceedings that may result from the filing of the application, and in that connection each party will pay its own fees for its own witnesses and attorneys.

If the Interstate Commerce Commission issues an order denying the application for approval of this sale, this agreement shall thereupon terminate and be of no further force or effect. If the Interstate Commerce Commission issues an order approving this sale, but subject to one or more conditions, any party hereto may, in the exercise of its sole discretion, reject such conditions and the Commission's order and this agreement shall thereupon terminate and be of no further force or effect. If the order approves the sale upon any condition, each party hereto shall have 15 days after the effective date of the order within which to notify the other parties in writing whether it accepts or rejects the condition and the Commission's order. If any party fails to give such written notice to the other parties within such period of time, it shall be deemed to have elected to have accepted such condition or conditions and the Commission's order.

9. *Assignment.*

This agreement shall extend to the successors of the parties hereto but no assignment hereof will be binding unless agreed to by each of the parties hereto.

10. *Continued Management by Seller.*

After the closing date, Seller shall manage the operations of Peninsula in accordance with the policies, conditions and standards established from time to time by Peninsula's Board of Directors and also in accordance with the requirements of paragraph 5 of this agreement relating to the conduct of the business of Peninsula during the closing period. Such management services shall include, without limitation thereto, the furnishing of:

(a) supervisory, administrative, clerical, accounting, stenographic and all other necessary managerial office personnel and services, and of substantially the same scope as furnished to Peninsula by Seller during recent years prior to the closing hereof;

(b) office space including all required utilities;

(c) office supplies; and

(d) personnel (who shall be employed and paid for by Peninsula) to load and unload stock cars shipped from and delivered to the Portland, Oregon, stockyards of Seller.

For such management services Buyers will pay Seller a management fee of $10,000 per year, payable quarterly. Seller may terminate its management services by giving six months' written notice of termination. Buyers may terminate such management services upon 30 days' written notice.

11. *Unearned Insurance Premiums Paid by Seller.*

At the time of closing and at reasonable periods thereafter, the parties hereto shall have an accounting for all unearned insurance premiums paid by Seller on insurance policies which cover risks of Peninsula.

12. *Crossing Permit.*

Seller owns approximately 40 acres of real property on either side of one of the main lines of Peninsula. Promptly after the closing date Peninsula will grant to Seller a permit for a crossing over its tracks to provide access to both areas of Seller's said forty-acre parcel. The crossing agreement shall be in writing and on the form attached hereto marked Exhibit D and by this reference made a part hereof.

13. *Resignation of Directors and Officers.*

At the closing Seller shall make available to Buyers, unless otherwise requested by them, the written resignation of Peninsula's directors or officers and shall take, or cause to be taken, such action as Buyers may request with respect to changes in directors and officers.

14. *Notices.*

Notice shall be given hereunder by depositing the same in the United States mail in an envelope, with postage prepaid, addressed to the parties at the following addresses:

United Stockyards Corporation,
141 West Jackson Boulevard,
Chicago, Illinois 60604.

Union Pacific Railroad Company,
828 Pittock Block,
Portland, Oregon 97205.

Spokane, Portland and Seattle Railway Company,
American Bank Building,
Portland, Oregon 97205

Notices shall be deemed given when the same are deposited in the United States mail in the manner herein provided.

15. *Consolidated Tax Return.*

After the closing date Buyers shall cause Peninsula to execute and/or deliver such consents as Seller may require to effect the filing of a consolidated income tax return to include Peninsula's operations during the period of Seller's ownership.

16. *Location of Tracks and Buildings—Grade Crossings.*

Seller warrants that all of Peninsula's existing tracks and buildings are located upon Peninsula's real property described in Exhibit B hereto, and that Peninsula has or will obtain, prior to the closing, in a form satisfactory to Buyers all conveyances and all city, county, state and other governmental rights, permits and approvals which Buyers deem necessary for the use and operation of such tracks and property and the use and operation of all grade crossings of Peninsula's tracks.

17. *Board Approval.*

This agreement shall be effective as of the date hereof, subject, however, to the approval ~~within 90 days from the date hereof~~ EHB NSW RWH of the Executive Committee of the Board of Trustees of Spokane, Portland and Seattle Railway Company, the Board of Directors of United Stockyards Corporation and the Executive Committee of Union Pacific Railroad Company.

IN WITNESS WHEREOF, the parties hereto have executed these presents as of the day and year first above written.

* * *

EXHIBIT 7—EXHIBIT A THERETO.

PENINSULA TERMINAL COMPANY
North Portland, Oregon

STATEMENT OF ASSETS AND LIABILITIES AT FEBRUARY 28, 1967

ASSETS

CURRENT ASSETS		
Cash on hand	$ 17,364.79	
Accounts receivable	7,888.07	
Materials and supplies	8,669.12	
Prepayments, insurance, etc.	1,116.58	
Total Current Assets		$ 35,038.56
PROPERTIES (Transportation)		
Road and equipment	$208,363.53	
Less accrued depreciation	11,425.22	
Total Transportation Property		$196,938.31
MISCELLANEOUS (Physical Property)		7,740.00
Total Assets		$239,716.87

LIABILITIES AND SHAREHOLDERS' EQUITY

CURRENT LIABILITIES		
Wages payable	2,240.43	
Accounts payable	73,808.96	
Federal Income Taxes	3,380.52	
Other taxes	1,612.00	
Other current liabilities	1,170.77	
Total Current Liabilities		$ 82,212.68
CAPITAL STOCK		
1,500 shares of common stock	$150,000.00	
Retained income	7,504.19	
Total Shareholders' Equity		157,504.19
Total Liabilities and Shareholders' Equity		$239,716.87

EXHIBIT 7—EXHIBIT B THERETO.

(Page 1 only)

PENINSULA TERMINAL COMPANY
North Portland, Oregon

REAL AND PERSONAL PROPERTY AT FEBRUARY 28,1967

Description	*Account No.*	*Amount*
Engineering	1	$ 1,904.58
Land for transportation purposes*	2	44,786.80
Grading	3	16,801.96
Ties	8	10,815.94
Rails	9	15,561.71
Other track material	10	11,488.08
Ballast	11	2,413.68
Track laying and surfacing	12	13,653.99
Fences, snow sheds and signs	13	335.27
Stations and office buildings	16	4,727.21
Fuel stations	19	115.28
Shops and engine houses	20	10,055.72
Roadway machines	37	572.62
Roadway small tools	38	136.89
Shop machinery	44	1,324.16
Diesel locomotive—1-50 ton	52	16,110.84
" " —1-70 ton	52	16,110.84
Organization expense	71	4,088.83
Law	76	110.90
Interest during construction	76	561.19
		$208,363.53
Less depreciation		11,425.22
Net physical property for transportation purposes		$196,938.31

*All real property owned by Peninsula Terminal Company is described in Pioneer National Title Insurance Company's Lot Book Report dated September 12, 1966, Order No. 34660, which report is incorporated herein by reference. A copy of such report is attached hereto.

* * *

PETITION FOR INCLUSION OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Pursuant to Section 5(2)(d) of the Interstate Commerce Act, 49 U. S. C. Sec. 5(2)(d), and Rule 102 of the Commission's General Rules of Practice, 49 CFR Sec. 1.102, the Chicago, Milwaukee, St. Paul and Railroad Company (hereinafter "Milwaukee") herewith petitions for inclusion in the above-captioned transaction, pleading that it is a railroad in the territory involved in this transaction and that this transaction, if consummated as proposed by Applicants herein without Milwaukee's inclusion on the terms specified below, would not be consistent with the public interest; and further that if this transaction is approved by the Commission to include Milwaukee on the below-stated terms it will be consistent with the public interest. In support of this Petition, Milwaukee respectfully states as follows:

I

The Milwaukee is a Wisconsin corporation and operates as a common carrier by railroad, subject to Part I of the Interstate Commerce Act, in the states of Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Washington and Wisconsin. Milwaukee's prineipal transcontinental line extends from Chicago to Longview, Washington, a point on the lower Columbia River 46 rail miles north of Portland, Oregon.

II.

Applicant, Spokane, Portland and Seattle Railway Company ("SP&C"), is an applicant with Great Northern Railway Company ("GN") and Northern Pacific Railway Company ("NP") in F. D. 21478, *et al.*, the so-called "Northern Lines Merger" proceeding, in which SP&S, GN, NP and the Chicago, Burlington and Quincy Railroad Company ("Burlington") seek authority to (1) merge the operations, properties and franchises of the Great Northern, Northern Pacific and Pacific Coast into a new company known as Great Northern Pacific & Burlington Lines, Inc.; (2) acquire on behalf of the new company stock ownership of all subsidiary and affiliated companies of the Great Northern and Northern Pacific, whether owned solely or jointly by one or both of these parent railroads (including SP&S) and acquire on behalf of the new company all leasehold rights, trackage rights, joint ownership in or use of any line or lines of railroad possessed by Great Northern, Northern Pacific or Pacific Coast; (3) merge into the new company the operations and properties and franchises of the Burlington and acquire through stock ownership all subsidiary or affiliated carriers of the Burlington and acquire all trackage rights, leasehold rights or joint ownership or user rights of the Burlington; and (4) lease on behalf of the new company the properties and assests of the SP&S for a term of 10 years, and acquisition and control by the new company as such lessee of sole or joint control, as the case may be, of all carriers subsidiary to or affiliated with SP&S at the time of the lease, and acquisition and exercise, during the term of such lease by the new company as lessee, of all leasehold rights, all trackage rights and all joint ownership in and rights of joint use of SP&S in any railroad line or lines and terminals incident thereto possessed by SP & S at the time of lease.

III.

Milwaukee, by leave of the Commission, intervened in F. D. 24178, *et al.*, and proposed certain conditions to the approval of the transaction proposed therein. Following denial of that application by the Commission on March 31, 1966, a petition for reconsideration was granted by the Commission, and rehearing and reargument were held; a decision by the Commission is imminent. Approval of the transaction conditioned upon acceptance of Milwaukee's conditions is expected.

IV.

Applicant SP&S, together with GN, NP and Burlington, became a party to a contract with Milwaukee entered October 26, 1966, which is of record in F. D. 24178, *et al.*, and specifically provides that, upon consummation of the transaction proposed in F. D. 24178, *et al.*, Milwaukee shall be allowed entry to Portland, Oregon via trackage rights over present NP and SP&S tracks between Longview Junction, Washington, and Portland, Oregon, including all main, second main, passing and industry tracks, and over SP&S tracks in the Line D valuation area in Portland, Oregon, with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points, regardless of origin or destination of said traffic (Exh. 250, pp-6-9, "Condition No. 2"). Wherefore, upon consummation of the transaction in F. D. 24178, *et al.*, Milwaukee will be an additional railroad connecting with Peninsula Terminal Company with the unrestricted right to serve the traffic originating or terminating on the lines of Peninsula Terminal Company, including that under development by the Port of Portland Commission in the Rivergate Industrial Area.

V.

The instant transaction, if approved by the Commission without inclusion of Milwaukee upon the terms stated below, would have the effect of foreclosing Milwaukee direct service to all the industries now or in the future to be located on the lines of Peninsula Terminal Company. With fifty per cent of Peninsula Terminal Company stock in the hands of Union Pacific Railroad Company, not a party to the contract referred to above, Milwaukee will not have any right similar to that sought by applicants herein (application p. 20) to operate over or obtain trackage rights in the lines of Peninsula Terminal Company. Industries on the lines of Peninsula Terminal Company will thus be denied the single-line service of Milwaukee to such points as Seattle, Tacoma, Spokane, Minneapolis-St. Paul, Kansas City, Chicago, Milwaukee, and Terre Haute, contrary to the public interest.

VI.

Inclusion of Milwaukee in the instant application, on the other hand, upon equal terms with those of applicants, will provide the shippers and industries now and in the future to be located on the lines of Peninsula Terminal Company with the benefits of additional rail service to such points as named above on the Milwaukee's lines, and to others not served by applicants, consistent with the public interest in this transaction.

VII.

The terms under which Milwaukee seeks inclusion in this transaction are as follows:

1. Milwaukee be authorized to purchase one-third of Peninsula Terminal Company's outstanding capital

stock from its present owner, United Stockyards Corporation; upon the same terms and for the same per-share consideration as set forth in the instant application, pp. 15 and 18-19.

2. Milwaukee to pay one-third the contribution to capital of $70,000 to cover the purchase price of the one 70- and one 50-ton diesel locomotives sold by United Stockyards Corporation to Peninsula Terminal Company, as applicants propose on page 19 of the instant application.

3. That Milwaukee be granted the right to acquire trackage rights over intervening connecting trackage jointly owned by applicants, from SP&S main line to Peninsula Terminal Company's lines upon such reasonable terms and conditions, and for such consideration, as Milwaukee and applicants may negotiate, or, failing such negotiations, upon such terms and conditions and for such consideration as the Commission may find just and reasonable.

WHEREFORE, Milwaukee prays:

1. That the Commission enter an order granting this Petition.

2. That, unless applicants herein stipulate with Milwaukee that its inclusion in the instant transaction be allowed on an equal basis, the instant application be set for public hearing in Portland, Oregon, for the purpose of receiving evidence in suppport of this Petition.

3. That the Commission order such other and further relief for Milwaukee as may be meet.

Dated at Chicago, Illinois, this 22nd day of Augst, 1967.

• • •

AMENDED PETITION OF SOUTHERN PACIFIC COMPANY IN INTERVENTION, STATING REQUEST FOR INCLUSION AND FOR TRACKAGE RIGHTS

COMES now Southern Pacific Company, party to the above captioned proceeding, to file its amended petition in intervention, stating requests for inclusion and for certain trackage rights:

I

Southern Pacific Company is a Delaware corporation, which owns and operates lines of railroad in the states of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas and Louisiana. It is a common carrier by railroad subject to Part I of the Interstate Commerce Act.

II

Petitioner has a substantial interest in this proceeding and in the provision of rail service in and about the City of Portland, Ore. Petitioner has served Portland, directly and through predecessor companies, continuously since April 1868, and has provided rail service from Portland to points in California and other states served by it continuously since December 17, 1887. Petitioner has been an integral part of the industrial and commercial community of Portland for almost 100 years.

III

Peninsula Terminal Company serves an important industrial area at Portland. Petitioner is desirous of assuring that traffic originating or terminating on the rails of Peninsula Terminal Company will flow freely and with-

out impediment or hindrance to and from all line-haul carriers serving Portland, including petitioner. Petitioner is also desirous of promoting and stimulating the industrial development of the area served by Peninsula Terminal Company, and has concluded that these objectives can be obtained only if it becomes an equal owner of Peninsula Terminal Company jointly with such other railroads as may be authorized by the Commission to participate in joint ownership, and therefore requests inclusion, pursuant to such terms and conditions as the Commission may establish.

IV

The request of Southern Pacific for inclusion is made pursuant to section 5(2)(d) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(d). Consummation of the proposal of applicants herein without Southern Pacific's inclusion would be contrary to the public interest, and should be denied, whereas consummation of the transaction with Southern Pacific Company as an equal owner will be consistent with the public interest and should be approved.

V

Petitioner further requests that, as a condition to participation in ownership of Peninsula Terminal Company, applicants Union Pacific Railroad Company and Spokane, Portland & Seattle Railway Company be required to grant petitioner bridge trackage rights over applicant UP's main line and terminal trackage between Peninsula Terminal Company and the Southern Pacific-Union Pacific track connection at East Portland, Ore. In the event either or both of said applicants shall decline to participate in the acquisition of Peninsula Terminal Company subject to such

condition, then petitioner requests that the Commission enter its order pursuant to section 3(5) of the Interstate Commerce Act, 49 U. S. C. § 3(5), authorizing petitioner to use trackage of applicant UP as aforesaid. Such use of said trackage would not substantially impair UP or SP&S's ability to handle their own business, and would be in the public interest.

WHEREFORE, Southern Pacific Company prays that the Commission order its inclusion as an equal joint owner in Peninsula Terminal Company, and that applicants be required to grant Southern Pacific trackage rights between East Portland and the yards of Peninsula Terminal Company, both as a condition to participation in ownership of Peninsula Terminal Company, and also under section 3(5) of the Interstate Commerce Act, independently of the request for participation in ownership.

Dated at San Francisco, Calif., this 28th day of November, 1967.

* * *

PART I

APPLICATION OF SOUTHERN PACIFIC COMPANY UNDER SECTION 3(5) OF THE INTERSTATE COMMERCE ACT FOR AN ORDER REQUIRING COMMON USE OF THE TERMINAL FACILITIES OF THE PENINSULA TERMINAL COMPANY AND USE OF CERTAIN MAIN LINE TRACKS FOR A REASONABLE DISTANCE OUTSIDE OF SUCH TERMINAL.

Comes now Southern Pacific Company (Southern Pacific), applicant herein, and requests that the Commission enter an order pursuant to Section 3(5) of the Interstate Commerce Act requiring the common use of Peninsula Terminal Company, a "terminal facility" within the meaning of Section 3(5) of the Act, together with the necessary access over certain main-line trackage of the Union Pacific Railroad Company, and as grounds for such application states:

I

Southern Pacific is a Delaware corporation which owns and operates lines of railroad in the states of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas and Louisiana. It is a common carrier by railroad subject to Part I of the Interstate Commerce Act.

II

Southern Pacific has served Portland, Oregon, directly and through predecessor companies, continuously for almost 100 years, and has been a substantial and integral part of the industrial and commercial community of Portland during that time.

III

By their application filed July 25, 1967, Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company (Union Pacific) seek authority under Section 5(2) of the Interstate Commerce Act to acquire control of Peninsula Terminal Company through ownership of all its outstanding capital stock. By its amended petition dated November 28, 1967, Southern Pacific Company intervened in Finance Docket No. 24679 requesting that, as a condition to the approval of the application in Finance Docket No. 24679, Southern Pacific Company be included as a joint owner of Peninsula Terminal Company, and be granted certain trackage rights over Union Pacific in order to reach said terminal facility.

IV

Because Peninsula Terminal Company serves an important Portland industrial area, Southern Pacific desires to assure the traffic originating or terminating on the rails of Peninsula Terminal Company will flow freely and efficiently to and from all line-haul carriers serving Portland, including applicant. Southern Pacific desires to participate in promotion of the industrial development of the important areas served by Peninsula Terminal Company, and has concluded that this objective can best be accomplished through an order permitting its common use of Peninsula Terminal Company.

V

Southern Pacific further requests in order to assure the most efficient rail service to the public to and from points on Peninsula Terminal Company, and to implement most effectively the proposed common use of Peninsula Terminal Company, that the Commission grant South-

ern Pacific bridge trackage rights over Union Pacific between Peninsula Terminal Company and Southern Pacific-Union Pacific track connection at East Portland, Oregon, a distance of 6.75 miles. Such mileage is a "reasonable distance" outside of Peninsula Terminal Company within the meaning of Section 3(5).

VI

The proposed common use by Southern Pacific of the terminal facilities of Peninsula Terminal Company, and the proposed trackage rights over 6.75 miles of Union Pacific trackage outside of the terminal area, would be practicable and in the public interest and would not substantially impair the ability of either Peninsula Terminal Company or Union Pacific to handle its own business.

PART II

APPLICATION OF SOUTHERN PACIFIC COMPANY UNDER SECTION 3(5) OF THE INTERSTATE COMMERCE ACT FOR AN ORDER REQUIRING COMMON USE OF CERTAIN TERMINAL FACILITIES OF UNION PACIFIC RAILROAD COMPANY AT PORTLAND, OREGON

Comes now Southern Pacific Company (Southern Pacific), applicant herein, and requests that the Commission enter an order pursuant to Section 3(5) of the Interstate Commerce Act requiring the common use of the Union Pacific trackage between Peninsula Terminal Company and the Southern Pacific-Union Pacific connection at East Portland Oregon, a distance of 6.75 miles, and as grounds for such application states:

I

Southern Pacific repeates the allegations contained in paragraphs I, II and III of PART I of the Application herein, and incorporates the same by reference as if set forth in full.

II

The properties of Union Pacific with respect to which common use is sought are "terminal facilities" within the meaning of Section 3(5) of the Act, and provide direct access to an important and developing industrial area of Portland, which area is presently served by Peninsula Terminal Company. Such common use by Southern Pacific would be practicable and in the public interest, and would not substantially impair the ability of Union Pacific to handle its own traffic.

WHEREFORE, Southern Pacific prays that the Commission enter an order pursuant to Section 3(5) requiring:

(1) The common use of Peninsula Terminal Company, together with bridge trackage rights over Union Pacific between Peninsula Terminal Company and the Southern Pacific-Union Pacific connection at East Portland, Oregon;

(2) The common use of the terminal facilities of Union Pacific between Peninsula Terminal Company and the Southern Pacific-Union Pacific connection at East Portland, Oregon.

Southern Pacific further prays that this application be consolidated for hearing with Finance Docket No. 24679, application of Union Pacific and Spokane, Portland and Seattle Railway Company under Section 5(2) for stock control of Peninsula Terminal Company; that the date of January 15, 1968 presently scheduled for the hearing of Finance Docket No. 24679 be canceled; and that consolidated hearing of this matter be held not sooner than March 1, 1968, in order to permit Southern Pacific to prepare evidence in support of its applications herein.

* * *

REPLY OF APPLICANT SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY TO PETITION OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, REQUESTING INCLUSION AND TRACKAGE RIGHTS.

Comes now applicant, Spokane, Portland & Seattle Railway Company, hereinafter called SP&S, and replies to the petition of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter called the Milwaukee, requesting inclusion in the transaction covered by the above entitled application and further requesting an order directing that the Milwaukee be permitted to purchase an interest in the North Portland interchange tracks and states as follows:

I.

The Milwaukee has requested that it be granted trackage rights in the North Portland interchange tracks jointly owned by SP&S, Northern Pacific Railway Company, hereinafter called Northern Pacific, Union Pacific and Peninsula Terminal Company, hereinafter called Peninsula, which are likewise used under contractual arrangement by the Great Northern Railway Company, hereinafter called Great Northern. Said interchange tracks are presently used for the purpose of interchanging traffic between Peninsula on the one hand and the aforesaid rail carriers on the other. In addition, these tracks serve as a important interchange point between the SP&S-Great Northern-Northern Pacific on the one hand and Union Pacific on the other with approximately two-thirds of all traffic interchanged in the latter category. Applicant denies that granting of trackage rights or joint ownership of said North Portland interchange tracks is in the public interest, and further denies that the Milwaukee may lawfully be granted such rights in the instant proceeding.

II.

The Milwaukee also requests that it be authorized to purchase one-third interest in the outstanding stock of Peninsula simultaneously with the stock purchase of the SP&S and Union Pacific. SP&S denies that the inclusion of the Milwaukee in the purchase of the stock ownership of Peninsula would be in furtherance of the public interest.

III.

Some language in the Milwaukee's said petition indicates that it also desires trackage rights over the tracks of the Peninsula. SP&S and Union Pacific have not by their petitions asked for such rights, and the SP&S denies that there is any need for the Milwaukee to have trackage rights over Peninsula's tracks.

WHEREFORE, the SP&S prays that the Commission deny the Milwaukee's petition in its entirety.

Dated at Portland, Oregon, this 27th day of December, 1967.

REPLY TO PETITION FOR INCLUSION OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY.

Comes now applicant Union Pacific Railroad Company (Union Pacific) and replies to the petition for inclusion of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee), filed herein pursuant to Rule 1.102, and requests that the relief sought in said petition be denied and, further, that the Commission determine that Milwaukee has no standing to appear in this proceeding as a railroad in the territory because it is not now "another railroad . . . in the territory involved" as the term is used in Section 5(2)(d) of the Interstate Commerce Act.

I

Spokane, Portland & Seattle Railway Company (SP&S) and Union Pacific, hereinafter referred to collectively as "applicants", operate as common carrier railroads in various states including Oregon and physically connect with Peninsula Terminal Company (Peninsula) at North Portland, Oregon.

II.

Lines of Milwaukee presently terminate, in the Pacific Northwest, on the Lower Columbia River at Longview, Washington, some 46 miles north of Portland.

III

The recent Commission decision in Finance Docket No. 24178 *et al., Great Northern Pacific & B. Lines, etc.* (November 30, 1967) 331 ICC 228, does not give Milwaukee automatic access to Portland. Many requests for reconsideration and appeals could postpone any access of Mil-

waukee for many years. Furthermore, it is likely that Milwaukee will be required to file and successfully progress separate applications under Section 1(18) or 5(2) before it can gain final approval for access over the Northern Pacific-SP&S trackage. This would entail the assumption by the Milwaukee of the burden of proving public convenience and necessity or consistency with the public interest. Union Pacific contends that Milwaukee must successfully complete one of these courses of action before it can take advantage of Condition 2 in the "Northern Lines" merger and be considered a railroad anywhere near the territory involved in the instant proceeding.

IV

Assuming that Milwaukee is at some future time successful in gaining access to Portland over the Northern Pacific-SP&S line, it would still not connect with Peninsula trackage because of the intervening North Portland interchange track, jointly owned by SP&S-NP, Union Pacific and Peninsula, which physically separates the NP-SP&S Main Line from Peninsula trackage. The North Portland interchange track not only connects the Union Pacific and NP-SP&S Main Lines with Peninsula but also serves as an important interchange point between the SP&S-Great Northern on the one hand and Union Pacific on the other. Milwaukee recognizes the need for access across the North Portland interchange track as it has asked for trackage rights over "the intervening connecting trackage jointly owned by applicants . . ."

V

This relief cannot be granted in this proceeding because the relief involves the filing of a separate application for trackage rights with distinct burdens of proof, pursuant

to Sections 1(18), 3(5) or 5(2) of the Act. Because of this, applicants are unduly burdened in resisting this improper request which substantially broadens the issues in the instant proceeding. Milwaukee will suffer no burden in making the proper application for access over the tracks involved if it ever obtains running rights into Portland.

VI

Applicants oppose Milwaukee's petition for inclusion as an owner of Peninsula's stock and for trackage rights. Peninsula is a small railroad with less than 4 miles of track and serves 12 to 15 industries. Applicants have served the North Portland area in conjunction with Peninsula since 1906 and the interjection of Milwaukee, which has never served this area, as an owner of Peninsula could destroy the historic working relationship as it now exists and thereby lead to a cumbersome, confused and divided management with resulting policy stalemates and serious deterioration of service. Milwaukee service is now available to Peninsula industries as a connecting carrier, and this will be continued through maintenance of all routes and channels of trade via existing junctions and gateways.

VII

Because Milwaukee must have trackage rights over the NP-SP&S Main Line as well as intervening connecting tracks before it can physically connect with Peninsula, and the obvious inability of the Commission to grant in this proceeding relief sought under Milwaukee's maverick petition for inclusion filed pursuant to Rule 1.102, Union Pacific respectfully requests that said petition be denied in total and that the Commission determine that the Milwaukee has no standing to appear as "a railroad in the territory involved" as defined in Section 5(2)(d) of the Act.

WHEREFORE, Union Pacific prays that the Commission enter an order finding that the Milwaukee has no standing in this proceeding to obtain any relief sought by it in its petition and, further, denying Milwaukee's petition in its entirety.

Dated at Portland, Oregon, this 27th day of December, 1967.

* * *

SUPPLEMENT TO PETITION FOR INCLUSION OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY.

By petition dated August 22, 1967, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as "the Milwaukee") petitioned, as a railroad in the territory involved in the transaction, for inclusion in the above-captioned transaction on an equal basis with applicants, and for trackage rights over intervening connecting trackage jointly owned by applicants extending from the main line of present Spokane, Portland and Seattle Railway Company (SP&S) to Peninsula Terminal Company's lines, upon such reasonable terms and conditions and for such consideration as Milwaukee and applicants may negotiate, or, failing such negotiations, upon such terms and conditions and for such consideration as the Commission may find just and reasonable. In its prayer the Milwaukee requested that the Commission enter an order granting this petition, and that unless applicants stipulate with Milwaukee for its inclusion in the instant transaction on an equal basis, the said application be set for public hearing at Portland, Oregon. In the interim no such stipulation with Milwaukee has been forth-

coming from applicants, and by separate replies dated December 27, 1967, respectively, applicants SP&S and Union Pacific pray that the Milwaukee's petition be denied in its entirety. By way of supplement to its said petition for inclusion, the Milwaukee states as follows.

I.

The Milwaukee in support of its petition for inclusion in the above-entitled transaction, cited the proposed consolidation of Great Northern, Northern Pacific Coast and Chicago, Burlington & Quincy Railroads into a new company known as "Great Northern Pacific & Burlington Lines, Inc." and the lease by the new company of the properties and assets of the SP&S then pending before the Commission in F. D. 21478, *et al.*, sometimes known as the "Northern Lines Merger." Subsequent to filing of said petition for inclusion, the Commission by its report and order on reconsideration and further hearing decided November 30, 1967 and served December 15, 1967 in F. D. 21478, *et al.* (331 I. C. C. 228) authorized the transactions proposed in said dockets, subject to conditions set forth in Appendix L, specifically Condition 24 thereof, which report and order, by reference are made a part of this Supplement to Milwaukee Petition for Inclusion herein.

II.

The applicants in said Finance Docket No. 21478, *et al.*, have publicly announced their intention to consummate the said transactions as approved and authorized by the Commission and upon or before the effective date of said order of the Commission therein the Milwaukee will file application or applications needed to implement said condition 24; that these procedural steps and the time re-

quired to complete them do not impair the Commission's jurisdiction in this case with respect to the Milwaukee's petition herein or its obligation to protect the Milwaukee's interest and the public interest.

III.

That in light of the replies of applicants herein to the Milwaukee's petition for inclusion, the Milwaukee alleges that the joint application herein is for the purpose of bottling up the Milwaukee at Portland and impair its ability to provide a competitive service to industries served or to be served by Peninsula Terminal Company contrary to the public interest and the plain intent of the Commission's said report and order in F. D. No. 21478

IV.

Oregon-Washington Railroad & Navigation Company (OWR&N) is wholly owned by Union Pacific and insofar as involved here, its properties and franchises are leased to and operated by Union Pacific. That upon its extension to Portland, the Milwaukee will operate over the present main line of SP&S at North Portland, Oregon

V.

The intervening trackage between the Peninsula Terminal Company trackage and the SP&S main line, known as North Portland interchange tracks, is shown on map marked "Exhibit No. 6" attached to the application in the instant proceedings, by purple and by yellow lines. Tracks shown in purple are jointly owned by SP&S, NP and the OWR&N and tracks shown in yellow are jointly owned by SP&S, NP, OWR&N and Peninsula Terminal Company. These tracks are also used by Great Northern under contract. The trackage of the Peninsula Terminal Company

and the connecting trackage mentioned are located within the terminal area of the city of Portland, Oregon, which the Milwaukee will serve pursuant to said Condition 24, are "terminal facilities" within the purview of Section 3(5) of the Act and, as such, fall within the Commission's jurisdiction under Section 3(5) of the Interstate Commerce Act, 49 U. S. C. Sec. 3(5). On consummation of the said Northern Lines consolidation and lease of the SP&S trackage, trackage not owned in whole or in part by Peninsula will be owned jointly by SP&S, Union Pacific, and the Great Northern Pacific & Burlington Lines, Inc., and operated by the latter two companies.

VI.

That joint use of said intervening trackage would not substantially impair the ability of either Union Pacific, Great Northern Pacific & Burlington Lines, Inc., or Peninsula Terminal Company to handle their own business, and would be in the public interest.

WHEREFORE, Milwaukee prays:

1. That the Commission enter an order granting its petition for inclusion herein as hereinabove supplemented.

2. That applicants be required to grant Milwaukee trackage rights over intervening trackage at North Portland connecting with the yards of Peninsula Terminal Company, both as a condition to participation in ownership of Peninsula Terminal Company and also under Section 3(5) of the Interstate Commerce Act.

3. That the Commission order such other and further relief for Milwaukee as may be meet.

Dated at Chicago, Illinois, this 26th day of January, 1968.

* * *

PETITION OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY FOR ISSUANCE OF SUBPOENAS *DUCES TECUM*

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, sometimes referred to as "the Milwaukee Road", heretofore filed in this proceeding and served upon the parties its petition for inclusion, dated August 22, 1967. Separate Replies of applicants, Union Pacific Railroad Company ("Union Pacific") and Spokane, Portland, & Seattle Railway Company ("SP&S") to the Milwaukee Road's petition for inclusion, both dated December 27, 1967, were received by the Milwaukee Road December 28, 1967, praying that said petition for inclusion be denied in its entirety.

In the Milwaukee Road's petition for inclusion it prayed *inter alia* that unless applicants herein stipulate with the Milwaukee that its inclusion in the instant transaction be allowed on an equal basis, the instant application be set for public hearing for the purpose of receiving evidence in support of the Milwaukee Road's petition for inclusion. No such stipulation has been forthcoming and now by their respective replies applicants have made it clear that they oppose this petition and seek to have it denied. Despite the Commission's recent decision in Finance Docket No. 21478, *et al, Great Northern Pacific & B. Lines, etc.* (Nov. 30, 1967), 331 ICC 228, it is contended that the Milwaukee Road does not have automatic access to Portland and, even if so, does not have access over connecting tracks at North Portland lying between present SP&S main line and Peninsula Terminal Company ("Peninsula") and requires a separate application.

In view of these contentions, a supplement to the Milwaukee Road's petition for inclusion has been filed herein and served upon the parties.

On information and belief, the Milwaukee Road views the joint application of Union Pacific and SP&S control of Peninsula as an attempt to keep the Milwaukee Road out of the industrial area served by Peninsula and the new Rivergate Industrial District being developed by the Port of Portland which is reached from the northeast side by the tracks of Peninsula. The documents, correspondence and memoranda sought through the respective subpoenas requested herein will tend to show, *inter alia* that by its present ownership of the trackage extending from North Portland Junction to Barnes Yard and thence to Rivergate Industrial District's southern boundaries, the applicant, Union Pacific, having heretofore granted certain trackage rights to SP&S, Great Northern Railway Company ("Great Northern") and Northern Pacific Railway Company ("Northern Pacific") to and through Barnes Yard to serve the Rivergate District, now jointly with these latter parties as applicants or beneficial owners of SP&S control access to this new industrial area from the south and that by its proposed joint control of Peninsula and ownership of connecting tracks from the present SP&S main line to Peninsula tracks (the North Portland interchange tracks) can also prevent the Milwaukee Road (upon its operation into Portland pursuant to its Portland condition imposed in Finance Docket No. 21478) from obtaining ready access to industries located on the Peninsula and in the Rivergate Industrial District from the north side via North Portland. It is, therefore, necessary to know what contractual arrangements exist between Union Pacific on the one hand and the SP&S or the Northern Pacific and Great Northern on the other regarding track-

age to and from Peninsula and to and from the Rivergate Industrial District, and between Peninsula and SP&S., Northern Pacific, Great Northern, or Union Pacific.

The Milwaukee Road has reason to believe that the original negotiations with United Stock Yards Corporation for purchase of the assets or stock control of Peninsula commenced during a period of five years immediately preceding the filing of the joint application herein and were conducted by SP&S., or its parent companies, Great Northern and Northern Pacific, and that the decision to include Union Pacific as a joint owner is a recent development generated by the correspondence, Memoranda and proceedings in Finance Docket No. 21478.

WHEREFORE, the Milwaukee Road, pursuant to the Commission's General Rules of Practice, Section 1.56, prays that the Commission issue the following subpoenas *duces tecum:*

1. A subpoena directed to E. H. Bailey, President, Union Pacific Railroad Company, 1416 Dodge Street, Omaha, Nebraska, requiring him or his authorized representative to appear at the initial hearing in the above-entitled application and produce for inspection by the parties and for copying therefrom for introduction in evidence in accordance with appropriate rules of evidence, the following documents of true copies thereof:

a. All current contracts and supplements or amendments thereto, between Union Pacific, or its subsidiary and lessor, Oregon-Washington Railroad & Navigation Company ("OWR&N") and Northern Pacific, Great Northern, or SP&S covering Union Pacific's use and operation of trackage of Northern Pacific and SP&S between Longview Junction, Washington, and Portland, Oregon;

b. All current contracts and supplements and amendments thereto, between Union Pacific, or its lessor, OWR&N, and Peninsula, SP&S., Great Northern, or Northern Pacific, relating to interchange tracks and connecting tracks at North Portland or North Portland Junction, Oregon, including but not limited to that certain agreement of August 31, 1938 between Peninsula, OWR&N and SP&S;

c. All current contracts and supplements and amendments thereto, between Union Pacific, or its subsidiary and lessor, OWR&N, and SP&S, Great Northern or Northern Pacific, relating to (1) trackage of Union Pacific or its lessor, OWR&N, extending from SP&S main line at North Portland Junction, Oregon, to Barnes Yard in Portland, Oregon, (2) trackage at Barnes Yard, and (3) trackage between Barnes Yard and Terminal No. 4, and Rivergate Industrial District, including but not limited to that certain contract dated October 6, 1921, between OWR&N or its lessee, Union Pacific, and the SP&S., Northern Pacific, and Great Northern, and any memoranda of understanding relating to such trackage where no formal contracts have been finalized;

d. All executive department, traffic department, engineering department and operating department reports, correspondence and memoranda possessed by Union Pacific and located in the General Offices of the company at Omaha or Portland, Oregon, relating in any manner to or connected with the proposed transaction covered by the above-entitled application, including but not limited to correspondence between Union Pacific and SP&S., Northern Pacific or Great Northern, and between Union Pacific and Peninsula

or Union Stock Yards Corporation or its present company, if any, and including company memoranda and inter-office correspondence of Union Pacific located at said general offices.

2. A subpoena directed to John M. Budd, President, Great Northern Railway Company, 175 East Fourth Street, St. Paul, Minnesota, as President of Great Northern and of SP&S (alternating with L .W. Menk, requiring him or his authorized representative to appear at the initial hearing in the above-entitled application and produce for inspection by the parties and for copying therefrom for introduction in evidence in accordance with appropriate rules of evidence, the following documents or true copies thereof:

a. All current contracts and supplements and amendments thereto, between SP&S., OWR&N., its parent company and lessee, Union Pacific, Northern Pacific or Great Northern, covering joint use and operation of SP&S line between Vancouver, Washington, and Portland, Oregon;

b. All current contracts and supplements and amendments thereto, between SP&S or Great Northern and Northern Pacific, Peninsula, or OWR&N or its lessee, Union Pacific, relating to interchange tracks and connecting tracks at North Portland or North Portland Junction, Oregon, including but not limited to that certain agreement of August 31, 1938, between Peninsula, OWR&N UP, and SP&S;

c. All current contracts and supplements and amendments thereto, between SP&S or Great Northern and Union Pacific or its lesssor and subsidiary, OWR&N, relating to SP&S connecting tracks at Barnes Yard, Portland, Oregon, and trackage of Union Pacific at Barnes Yard, and extending from Barnes

Yard to Terminal No. 4 and to Rivergate Industrial District, including but not limited to that certain contract, dated October 6, 1921, between SP&S and OWR&N or its lessee, Union Pacific, and including any memoranda or letters of understanding relating to such trackage where no formal contracts have been finalized;

d. All executive department, traffic department and engineering and operating department reports, correspondence and memoranda possessed by SP&S at its general offices at Portland, Oregon, or by Great Northern, as joint owner of SP&S, at its general offices at St. Paul, Minnesota, or Seattle, Washington, relating in any manner to or connected with the proposed transaction covered by the above-entitled application, including but not limited to correspondence between SP&S or Great Northern and Union Pacific; Great Northern and SP&S; Great Northern and Northern Pacific; SP&S and Northern Pacific; SP&S or Great Northern and Peninsula or its parent Company, United Stock Yards, or its parent company, if any, and including company and inter-office correspondence and memoranda of SP&S and of Great Northern located at said general offices.

3. A subpoena directed to L. W. Menk, President, Northern Pacific Railway Company, 176 East 5th. Street, St. Paul, Minnesota, as president of Northern Pacific Railway Company and of SP&S (alternating with John M. Budd), requiring him or his authorized representative to appear at the initial hearing in the above-entitled application and produce for inspection by the parties and for copying therefrom for introduction into evidence in accordance with appropriate rules of evidence, the following documents or true copies thereof:

a. All current contracts and supplements and amendments thereto, between SP&S or Northern Pacific and Great Northern, OWR&N, or its lessee, Union Pacific, covering the joint use and operation of Northern Pacific's line between Longview Junction, Washington, and Vancouver, Washington, and between Vancouver, Washington, and Portland, Oregon;

b. All current contracts and supplements and amendments thereto, between SP&S or Northern Pacific and Great Northern, Peninsula or OWR&N, or its lessee, Union Pacific, relating to interchange tracks and connecting tracks at North Portland or North Portland Junction, Oregon, including but not limited to that certain agreement of August 31, 1938 between Peninsula, OWR&N, UP, and SP&S;

c. All current contracts and supplements or amendments thereto between Northern Pacific SP&S., Great Northern, Union Pacific, or its lessor and subsidiary, OWR&N, relating to SP&S connecting tracks to Barnes Yard, Portland, Oregon, and to trackage of Union Pacific at Barnes Yard, and from Barnes Yard to Terminal No. 4 and Rivergate Industrial District, including but not limited to that certain contract dated October 6, 1921, between SP&S and OWR&N, or its lessee, Union Pacific, and including any memoranda or letters of understanding relating to such trackage where no formal contract has been finalized;

d. All executive department, traffic department, engineering and operating department reports, correspondence and memoranda possessed by SP&S at its general offices at Portland, Oregon, or by Northern Pacific, as joint owner of SP&S, at its general offices

at St. Paul, Minnesota, or Seattle, Washington, relating in any manner or connected with the proposed transaction covered by the above-entitled application, including but not limited to correspondence between SP&S or Northern Pacific and Union Pacific, Northern Pacific and SP&S, between Northern Pacific and Great Northern, between SP&S and Great Northern, between SP&S or Northern Pacific and Peninsula or its parent company, United Stock Yards, or its parent company, if any, and including company and inter-office correspondence and memoranda of SP&S and of Northern Pacific located at said general offices.

* * *

REPLY TO SUPPLEMENT TO PETITION FOR INCLUSION AND PETITION FOR ISSUANCE OF SUBPOENAS DUCES TECUM FILED BY CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

Comes now, Union Pacific Railroad Company (Union Pacific) and Spokane, Portland & Seattle Railway Company (SP&S), hereinafter referred to as "applicants," and reply to the Supplement to Petition and Petition for Issuance of Subpoenas *Duces Tecum* filed in this case by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) as follows:

I

In reply to Milwaukee's Supplement to Petition for Inclusion, applicants reiterate their opposition stated in their replies filed with the Commission on December 29, 1967.

II

In further reply to Milwaukee's Supplement to Petition for Inclusion, applicant Union Pacific points to the inadequate basis for Milwaukee's contention that the Commission must protect interests which it hopes to gain in Finance Docket No. 21478 *et al.* While applicants in Finance Docket 21478 *et al.* have publically announced their intention to consummate said transaction as soon as possible, the Commission has by its order dated January 15, 1968 postponed the time within which the merger may be consummated. Numerous unresolved petitions for reconsideration are pending, including one by Milwaukee and one by applicant Union Pacific. The position of Milwaukee in apparently claiming to be a railroad in the territory under Section 5 (2) (d) of the Act is based wholly upon a condition in a postponed merger on which petitions for reconsideration are pending. Such a position is untenable.

III

Milwaukee's contention that the joint application for acquisition of Peninsula Terminal (Peninsula) in Finance Docket No. 24679 ". . . is for the purpose of bottling up Milwaukee at Portland and impair its ability to provide a competitive service to industries served by . . ." Peninsula presents an issue far beyond any properly before the Commission in this proceeding. These allegations fly in the face of the representation of applicants that all routes and channels of trade by existing junctions and gateways will be maintained. (See application F. D. 24679, p. 21). This representation of applicants is the only sensible one that could be made in light of the current status of Milwaukee in its entry to Portland. Milwaukee now serves Portland as a connecting carrier with

many through routes and joint rates by applicant lines and the parent lines of SP&S. If Milwaukee gains access to Portland under Condition No. 24 in Finance Docket No. 21478 *et al.* and thereafter wishes to connect directly with Peninsula over the North Portland interchange track, then Milwaukee should at that time proceed independently by application to acquire common usage rights. As applicants have heretofore alleged, such usage should not be granted as part of Finance Docket No. 24679.

Both Northern Pacific Railway Company (Northern Pacific) and Peninsula own interests in the trackage over which Milwaukee seeks rights by its supplemental petition. Neither is a party to the application in Finance Docket No. 24679.

IV

As to Milwaukee's Petition for Issuance of Subpoenas *Duces Tecum*, your applicants oppose granting of said subpoenas for any of the documents requested on the grounds that the documents requested bear no relevance and are immaterial to the issues framed in Finance Docket No. 24679. Furthermore, the request for subpoenas interject matters into this proceeding which unduly broaden the issues. (See *Gulf, M. & O. R. Co.—Purchase—Securities* (1946) 267 ICC 265, 270, and *Wabash R. Co.—Control* (1941) 247 ICC 365, 374.)

V

The contracts and supplements requested by Milwaukee relating to trackage rights between Longview Junction, Washington, and Portland, Oregon, are part and parcel of the issues in the "northern lines" merger, Finance Docket No. 21478 *et al.*, and have absolutely no bearing on the application for acquisition of Peninsula. Peninsula

itself does not connect with said trackage, being separated by .8 mile of intervening interchange yard at Portland. These documents could not be used in any way to support Milwaukee's Petition for Inclusion or for usage of terminal facilities under a proper Section 3 (5) application and would unduly broaden the issues and burden applicants and the Commission with irrelevant and immaterial evidence.

VI

Contracts and supplements covering interchange tracks and connecting tracks at North Portland or North Portland Junction have no relevance to Milwaukee's request for inclusion until Milwaukee commences to operate trains along the Northern Pacific-SP&S Main Line under Condition No. 24 of the "northern lines" merger.

If Milwaukee, being successful in reaching Portland, were to proceed properly by an independent application under Section 3 (5) to acquire the right to connect directly with Peninsula over the North Portland interchange and if Milwaukee were successful in that effort, then under the statute the owners of that trackage and Milwaukee would be required to attempt to negotiate an agreement covering the use of that trackage by Milwaukee. Only if the parties were unsuccessful in those efforts, would the Commission have a right under the statute to fix the terms for the use of trackage, and only in that event would these contracts and memoranda which Milwaukee is attempting to subpoena be relevant.

VII

Contracts, supplements and amendments thereto concerning trackage between North Portland and Barnes Yard, within Barnes Yard itself and between Barnes Yard and

Terminal No. 4 and also Rivergate Industrial District, including memoranda of understandings involving these, are not only immaterial to this proceeding but tend to interject imagined "botting up" issues far beyond the scope of the application. The trackage covered by this portion of Milwaukee's request serves areas many miles from Peninsula industries. Peninsula has no right to use said trackage and none is being sought by it in this proceeding. If allowed, Milwaukee's request would open areas of evidence far afield from the issues in this case causing unnecessary delays.

VIII

Milwaukee's request for Executive Department, Traffic Department, Engineering Department and Operating Department reports, correspondence and memoranda related to the application in Finance Docket No. 24679 has no relevance or materiality to Milwaukee's request for inclusion. Milwaukee is embarking on a fishing expedition which could prolong this proceeding and serve no useful purpose. If Milwaukee is successful in its effort to acquire equal ownership in Peninsula, it will then in effect become a party to the contract between the applicants and Peninsula, and prior negotiations leading up to that contract will have no bearing.

WHEREFORE, applicants pray:

(1) That the Commission enter its order denying relief sought by Milwaukee in its Petition for Inclusion as supplemented, and

(2) That the Commission deny The Petition for Issuance of Subpoenas *Duces Tecum*.

* * *

SERVICE DATE
FEBRUARY 23, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 13th day of February, 1968.

Finance Docket No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Upon consideration of the record of the above-entitled proceedings; the joint petition of Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company (applicants), filed January 29, 1968, for reconsideration of order of the Commission dated January 5, 1968; the petition of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), filed January 29, 1968, for subpoenas *duces tecum;* the petition of Crown Zellerbach Corporation for leave to intervene in these proceedings; and the joint reply thereto by applicants, filed January 29, 1968; and

It appearing, That by order dated January 5, 1968, the Commission, Commissioner Tuggle, directed that the matters in Finance Docket Nos. 24890 and 24891 be heard on a common record with the title proceeding;

[1] This order also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co.—Common Use of Certain Terminal Facilities—Union Pacific Co.

It further appearing, That the petition of applicants for reconsideration is without merit, in that orderly procedure requires that these matters be heard on a common record, in order to provide a more thorough consideration and better assessment of the issues involved;

It further appearing, That the petition of Milwaukee for subpoenas *duces tecum* is without merit, as the relevancy and need of the matters sought to be produced have not been established;

And it further appearing, That the petition of Crown Zellerbach Corporation for leave to intervene is pertinent to the issues already presented and would not unduly broaden them; and for good cause:

F. D. No. 24679 *et al.*

It is ordered, That the petition for reconsideration filed by the applicants and the petition for the issuance of subpoenas *duces tecum* filed by the Milwaukee, be, and they are hereby, denied, for the reason that sufficient grounds have not been shown to warrant the action sought.

And it is further ordered, That the Crown Zellerbach Corporation be, and it is hereby, permitted to intervene and be treated as a party to these proceedings, provided, however, that the permission to intervene herein granted shall not be construed to allow intervenor to unduly broaden the issues raised in these proceedings.

By the Commission, Division 3, acting as an Appellate Division.

(SEAL)

H. Neil Garson,
Secretary.

HEARING EXHIBITS AND EXCERPTS FROM TESTIMONY.

EXHIBIT 1

STATEMENT OF E. GROSVENOR PLOWMAN.

My name is E. Grosvenor Plowman. My office is at 48 Partridge Circle, Portland, Maine, 04102. I am a consultant specializing in the business logistics of freight movements. I appear in these proceedings on behalf of The Port of Portland Commission, a government agency created in 1891 by the State of Oregon.

In this statement, I consider public interest aspects of several proceedings involving the acquisition of control of Peninsula Terminal Company (Peninsula Terminal), a switching railroad reaching the Rivergate area in the North Portland Peninsula in The Port of Portland district. Four railroads are directly involved: Union Pacific Railroad Company (Union Pacific or UP), Spokane, Portland and Seattle Railway Company (SP&S), Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) and Southern Pacific Company (Southern Pacific or SP). Also involved are Great Northern Railway Company (GN) and Northern Pacific Railway Company (NP) which own SP&S. Hereafter, I shall sometimes refer to SP&S, GN and NP as the SP&S Group or the Northern Lines.

For convenience in this statement, I shall refer to other railroads by the commonly used abbreviations or short names.

* * *

2. *Background; Basic Considerations*

Portland is a leading transportation and economic center and a major distribution point in the Pacific Northwest. It is a seaport of major importance to the Nation. Its access to the ocean is via a deep draft sea channel progressively deepened over a period of 75 years with funds provided by the Federal Government and The Port of Portland. The Commission of Public Docks of the City of Portland (Dock Commission), created in 1910, has developed extensive public terminal facilities accommodating ocean vessels and river barges moving on the Columbia and Willamette River systems. For over a century, Portland has been growing as a transport and trade center. An essential of its present progress and future growth for the benefit of the Nation and the Northwest is the development of the Rivergate area.

Rivergate is still in its initial development stage. Today the area is chiefly marsh and floodland and unsuited for industrial, commercial or waterfront uses. Its level must be raised by means of fill materials dredged from the river. Completion of dredging and filling can be 5, 10 or 15 years in the future, depending on the need to create "made land" in advance of the market demand.

Rivergate's land will be relatively high cost because of the filling operation. This is offset by its strategic asset of location adjacent to almost six miles of waterfront on the 40-foot navigation channels of the lower Willamette and the Columbia Rivers. This location fact will encourage efforts to find buyers who are water-oriented, that is, who use ocean or up-river barge transportation for some shipments and rail or truck transportation for other cargo and/or who interchange freight between these modes. Effective use of this location advantage will require maxi-

mum automation of ship and/or barge discharge and loading, as well as automated transfer to and from rail or truck and water.

Rivergate is a land area in excess of four square miles at the confluence of the Willamette and Columbia Rivers. It is owned and is being developed by a government agency, The Port of Portland. Its dredging operation is the source of the fill material that is creating this usable land area. Because it is new land thus created, Rivergate today has no railroad tracks, no highways, no waterfront facilities, no utilities, no industrial or commercial buildings, other than at or near its land-side boundary. Rivergate's interest is in the adequacy of its 1970 and 1980 and 1990 facilities for ocean vessels and barges, and for trucks and freight cars. This primary requirement will be greatly aided or impaired by today's decisions, for example, as to how Oregon Steel's plant is to be served by rail and truck and as to how Crown Zellerbach's pole yard is to be served by barge or rail.

Rivergate today has five industrial activities within its boundaries, together occupying 265 acres, or less than one-tenth of the ultimately available area. These are Ashgrove Lime and Portland Cement Company, Conmetco Division of Consolidated Freightways, Collier Carbon and Chemical Company, and Oregon Steel Mills on the Willamette in the southeast corner of Rivergate, and the Crown Zellerbach pole yard located on the Columbia River in the northeast corner of Rivergate. Crown Zellerbach is the only industry within Rivergate now served by Peninsula Terminal. However, Peninsula Terminal does not own any tracks within Rivergate. It uses the private industry tracks owned by Crown Zellerbach for its service to this industry.

In the southeast corner, railroad service is presently performed over tracks of varied ownership. As I understand the situation, UP owns Barnes Yard and has granted the SP&S Group operating rights to bring to and remove from this yard their SP&S trains containing cars destined to or originating from present Rivergate industries. UP and SP&S have jointly constructed and own a track from this Barnes Yard to the Rivergate property line. The Port of Portland has built a connecting track within its property from the end of this UP-SP&S track to the property lines of the present industries. These industries have built their own connecting industry tracks.

The position of The Port of Portland, as introduced by witness Dirker in this proceeding, is that Rivergate desires and needs rail service at competitive rates and, as between carriers, equal operating conditions of access to Rivergate by all the linehaul railroads that now or in the future may reach Portland. The Port has a similar policy of equal and efficient access to Rivergate by all barge operators and ocean vessel operators serving Portland. The Port has intervened in this present proceeding in order to present Rivergate's need for service via Peninsula Terminal to be provided on equal terms by all the present and future linehaul railroads serving Portland. This necessary equality of access requires joint ownership of Peninsula Terminal by the SP&S Group and by Milwaukee, SP and UP. The Port recognizes that access by Milwaukee depends on completion of the pending merger of the SP&S Group into Great Northern Pacific & Burlington Railroad. My testimony is in support of this policy position of The Port of Portland.

The Port is aware of the potential inherent in fullest possible mechanization of cargo handling at dockside and

to or from surface modes of transportation, particularly truck and rail. The major role in Rivergate of the linehaul railroads serving Rivergate will be the mass production of transportation. By this I mean that railroad terminal operations within Rivergate must facilitate mechanized and rapid handling of liquid bulk products, dry bulk products and merchandise-type or general cargo-type freight in containers or other unitized forms. Joint ownership of Peninsula Terminal by all of Portland's linehaul railroads is a first step towards providing Rivergate with efficient railroad-type mass transportation.

On June 20, 1967, the Portland Railroad Conference was convened. It was attended by Governor Tom McCall of Oregon, representatives of the City, the Port and the Dock Commission, and the Presidents of UP SP, Milwaukee, GN and NP and the Vice President of SP&S. The principal subject was the rail switching situation in Portland with particular reference to Rivergate. The result was a commitment by the railroads to establish a single basis of switching charges and to absorb those charges within the linehaul rates under certain conditions. The commitment has not been finalized as yet. Its effective implementation is vital to the future of Rivergate.

The switching situation is of critical importance to Rivergate in planning and achieving both its near-term and long-range goals. In the following sections, I consider the transportation position of Portland and Rivergate in general and the rail transport needs of Rivergate in particular.

I have prepared a diagrammatic map exhibit to serve as basis for my explanation of the important aspects of Rivergate's present and future transportation needs. This map, my Exhibit No. 3, shows that Rivergate's present railroad service consists of minor, very short extensions of railroad

track into the Rivergate area. No railroad trackage exists in over 80 percent of Rivergate, because the land does not yet have either industrial or commercial value. It is marsh land or land subject to relatively severe annual flooding.

Exhibit No. 3 shows that the southeast corner of Rivergate is now served by UP and SP&S Group, with the actual switching performed by UP. The northeast corner of Rivergate is served by Peninsula Terminal. This switching carrier interchanges at North Portland with UP and with the SP&S Group. It follows, therefore, that the small southeast and northeast portions of Rivergate are now served by the same two linehaul carriers, namely, UP and SP&S. In the southeast corner, UP serves as the switching carrier to and from its Barnes Yard. In the northeast corner, Peninsula Terminal serves as the switching carrier.

Exhibit No. 3 also shows that SP does not at present reach Rivergate. The nearest point on SP is East Portland. SP is a part owner of both Portland Traction and Portland Terminal Companies. The former has no operating rights north of East Portland. The latter operates entirely on the south side of the Willamette River. As I have already indicated, Milwaukee, by virtue of trackage rights stemming from the net-yet-concluded Northern Lines merger case, will have the right to come into Portland from Vancouver over the Columbia River bridge now used by SP&S, NP, GN and UP. This route reaches the south side of the Columbia River at North Portland, thus making possible direct and low cost interchange between Milwaukee and Peninsula Terminal.

The undeveloped nature of Rivergate's land is convincing evidence that the three carriers now reaching, in one fashion or another, small parts of Rivergate did not develop their original trackage for the purpose of providing service

to and from Rivergate. Peninsula Terminal developed its 1½ route miles of switching-type tracks to serve the stockyards owned by the same interests. As time has gone on, Peninsula Terminal has added other industries, now said to number about 15. As a result, and despite the sharp reduction in its stockyards shipments, Peninsula Terminal has been able to maintain an average of about ten carloads per day. Only one of the 15 industries now on Peninsula Terminal is in Rivergate. Its traffic, though undoubtedly important, is only a portion of Peninsula Terminal's ten car daily average.

3. *Rivergate in Relation to Regional Rail Service*

The ton-miles generated by Western District Class 1 railroads increased 36.2 percent in the nine years from 1958, the recent low point, through 1966. My estimate is that by 1990, western railroad generated ton-miles will be twice the volume of 1966. Portland as one of the major western railroad terminal points will share in this growth, provided its rail facilities are adequate to meet this predicted increase of the next 25 years. Adequacy includes much more than, for example, the miles of terminal yard track. Rail traffic by 1990 will be concentrated even more than at present on main lines of railroads and will seek the lowest terminal costs and the most effectively mechanized freight handling terminal conditions. A higher proportion of rail traffic will be intermodal, requiring mechanized transfer from ship to rail or from truck to rail, or vice versa.

It is unnecessary to describe the rail network in detail for the purposes of this case. A few general comments will suffice, as follows:

1. Portland is now served by the Union Pacific which now provides single-line freight routes to and from Seattle, Spokane, Los Angeles, Salt Lake City, Denver, and the Missouri River.

2. Portland is now served by the SP&S Group, including GN and NP, that after merger will provide single-line freight routes to and from Seattle, Spokane, Denver, Twin Cities and Missouri River Crossings, as well as St. Louis and Chicago.

3. Portland is now served by Southern Pacific that now provides single-line freight routes to and from Ogden, San Francisco, Los Angeles, Phoenix, El Paso, Houston, New Orleans, Dallas, Memphis and St. Louis.

4. Assuming consummation of the Northern Lines merger, Milwaukee will have been authorized to serve Portland and will then provide single-line freight routes to and from Seattle, Spokane, Twin Cities, Missouri River Crossings, Milwaukee, Chicago and Terre Haute.

5. Portland also is served by two-line freight routes to and from San Francisco and Salt Lake City (GN-WP) and to and from Denver (SP-DRGW); and by three-line freight routes to and from Los Angeles, Phoenix, Houston and Dallas (GN,-WP, ATSF).

The numerous single-line freight routes reach almost every point in western United States with freight traffic community of interest, either as receiver or producer of traffic for Portland. This is a fact of significance in this Peninsula Terminal Acquisition application by the SP&S Group and UP. Unless all four railroads have equal access to the Peninsula Terminal gateway, the two owners will automatically create non-single-line switching conditions for the other two.

Bulk traffic, moving in solid blocks of cars or in fixed-consist unit trains, is impeded as much by terminal switching delays as by the necessity for linehaul interchange between two carriers. From the standpoint of Rivergate, if Milwaukee traffic has to be switched by SP&S or UP before reaching the Peninsula Terminal interchange, its single-line advantage to and from Milwaukee, Terre Haute or Cedar Rapids will lose most of its time and efficiency value. Similarly if SP traffic has to be switched by SP&S or UP, its single-line advantage to and from Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans and Memphis will lose its time and efficiency value.

4. *Rivergate's Present and Proposed Rail Service*

Peninsula Terminal is the only railroad now serving the northeast part of Rivergate. This I shall call the northern gateway. Peninsula Terminal serves only one industry in Rivergate. It connects with the SP&S Group and with UP at North Portland.

The following proposals are before the Commission:

1. In Finance Docket No. 24679, SP&S and UP seek to acquire control of Peninsula Terminal through ownership of all its capital stock. They oppose the inclusion of any other railroad and the efforts of SP and Milwaukee to reach Peninsula Terminal through trackage rights.

2. SP by petition in Finance Docket No. 24679 seeks (a) inclusion as an equal joint owner in Peninsula Terminal and (b) trackage rights between East Portland and the Peninsula Terminal yards as a condition of participation in ownership or independent of the request for inclusion. In Finance Dockets Nos. 24890 and 24891, SP has filed applications under section 3(5) of the Act under which it seeks (c) its common use of the terminal facilities of

Peninsula Terminal and bridge trackage rights over 6.75 miles of UP between Peninsula Terminal and the SP-UP connection at East Portland and, (d) SP's common use of UP's terminal facilities between Peninsula Terminal and the SP-UP connection at East Portland.

3. By petition in Finance Docket No. 24679, Milwaukee seeks inclusion as an owner in the proposed transaction and also trackage rights from the SP&S main line over jointly owned tracks of applicants SP&S and UP to Peninsula Terminal. In its December 27, 1967 reply to this petition, UP asserts that the Northern Lines merger case does not give Milwaukee automatic access to Portland and goes on to raise other objections.

In my testimony below, I shall not treat the several applications and petitions individually, but will address myself to the proposed transfer of ownership of Peninsula Terminal. This first step must be taken in such a way as to assure to Rivergate the adequate rail service which it must have. Basic to my consideration are the rail traffic potential of Rivergate and the kind of rail service it will need if it is to develop into a major industrial and freight interchange area, and make full use of its unique location with its six miles of frontage on deep water.

5. *Rivergate's Rail Service Needs*

At full development, under recent estimates, 500 to 600 freight cars per day will be handled to, from or within the Rivergate Industrial District. This means a movement of 40,000 tons of rail freight as a weekday maximum and roughly half or 20,000 tons as a weekday average.

At full development, 5, 10 or 15 years from now the volume to and from Rivergate will reach 5,000,000 tons of rail traffic annually. Under present switching practices, it has

been estimated that the Rivergate District must then have 50 miles of track for the storage of a maximum of 4,500 cars. As my testimony will show, the use of modern switching practices will reduce this figure to 2,000 cars.

In my view, the immediate future will see continued changes and improvements in railroad operating techniques. These will be indispensable not only for the efficiency of port areas and industrial districts such as Rivergate, but also for the very survival of the railroads as freight carriers. As related to Peninsula Terminal and Rivergate, let me briefly describe four different types of rail freight service and then consider their switching characteristics.

First, unit trains. Ultimately a large portion of rail traffic to or from Rivergate will move in fixed-consist, never-uncoupled unit trains carrying bulk commodities and perhaps other commodities moving in large volume.

Second, semi-unit trains. The less mechanized version of the unit train is the train of 40 to 150 cars moving in a block, that is, without repeated handling as single cars in hump yards and terminals.

Third, the trailer-on-flat-car (TOFC) and container-on-flat-car (COFC) or piggyback trains. This is a type of semi-unit train since its cars are taken off at intermediate or terminal points in blocks. TOFC-COFC is gradually taking the place of box car movements. For Rivergate this means that its small industries may not need sidetracks since its road facilities will be adequate for intercity and local truck movements and rail piggyback service.

Fourth, miscellaneous service involving industry trains and switching runs to, from and within Rivergate.

In my Exhibit No. 2, I estimate the daily train movements, cars, car days, revenue tons and track requirements at Rivergate.

Using the daily traffic estimates shown on the exhibit, I turn to the switching situation. For over a century the railroads have been increasing the size of their equipment, that is, more powerful locomotives, larger freight cars, longer trains and higher capacity facilities such as car dumper and belt conveyors. The 100-car train is commonplace; 200-car trains are no longer unusual; and longer trains of as many as 350 cars are in the experimental stage.

Some improvement of this type also has occurred in railroad switching technology. But the more efficient, modern methods of train operation are not yet widely used in terminal service for various reasons. Shippers and receivers of freight have not yet worn out and replaced their own loading and receiving equipment. Many one or two car sidings are in occasional use, although these are being phased out gradually. New switching technology is also limited by operating conditions attending numerous ownerships of railroads in metropolitan areas such as Portland. Later I shall say more of the terminal situation at Portland.

Rivergate, a new facility with potential for all types of traffic, presents a major opportunity for use of new technology in rail terminal service. In fact, this new technology must be used if Rivergate is to realize its potential. Unit and semi-unit trains eliminate nearly all or a substantial part of the time wasted in terminals by freight cars and their cargo. In its ultimate form, the unit train of 100 or more specially designed cars moves loaded in one direction and empty in the other between two highly mechanized terminals. These terminals load and unload the never-uncoupled cars as they move slowly through the loading

and unloading facilities. Under optimum conditions, the unit train moves directly through terminal areas to and from loading and unloading facilities without switchng delays. Groups of cars in linehaul semi-unit trains require some terminal switching, but switching economies are available if the semi-unit train moves directly through terminal areas to and from tracks adjacent to the loading and unloading facilties.

As indicated by my estimates and assumptions in my Exhibit No. 2, Rivergate at full development would handle daily two unit trains loaded with dry bulk or liquid bulk materials. One of these trains would have its unloading/loading operation fully mechanized so that the train would be unloaded and loaded within hours after arrival uncoupling engine or cars. From the second train which would be of the semi-unit type, cars would be uncoupled and switched in small groups. This train would be in Rivergate for two working days, and it would be necessary to have track space for two such trains.

These two daily unit trains would handle into or out of Rivergate 20,000 tons of cargo daily or 100,000 tons per five-day week. Even this immense weekly capacity may be insufficent, if, for example, four vessels each carrying 30,000 tons of bulk cargo, had to be loaded or unloaded in that week.

My Exhibit No. 2 provides for one TOFC-COFC train of 100 cars (5,000 tons of revenue frieght). The TOFC-COFC yard at Rivergate will presumably be located on interior land a mile or more from the waterfront and would include facilities for loading and unloading trailers and containers moving by rail, highway, water or air. Volume will vary according to the day of the week, vessel loading or unloading and seasonal changes. Terminal time or three days per car is assumed because of variability of actual conditions, but this terminal time should prove to be a maximum.

Rail piggyback traffic continues to grow even in the face of the general decline in rail traffic in 1967. With the containership becoming dominant in the North Atlantic ocean trades and with the container revolution coming also in the Pacific, I am confident Rivergate will have major TOFC-COFC activity in both domestic and foreign trade, provided it develops adequate facilities, and the Portland linehaul railroads provide low-cost, fast and reliable piggyback service to and from Rivergate.

Finally, as to large-industry and miscellaneous rail service at Rivergate at full development, my Exhibit No. 2 shows two industry trains handling 200 cars and two switching runs handling 100 cars. The two industry trains, one inbound and one outbound, would each handle an average of 65 loaded and 45 empty cars. Unit trains also are a potential here, for example, fixed-consist trains of iron ore to a steel plant such as Oregon Steel Mills.

The two switching runs shown in my Exhibit No. 2 (Line 5) would originate and terminate loads and provide and remove empties as required. The loads and empties would come from and go to all the Portland linehaul railroads and, to some extent, the local switching lines such as Portland Terminal. The switching crews would be handling 100 cars, and these would have the highest terminal time per car within Rivergate.

My estimates above may not be fully realized, and there may be variations in the types of service required, when Rivergate reaches full development. Nonetheless, it is clear that Rivergate will utilize unit, semi-unit and containerized trains for the movement of large volumes of freight. Obviously, these trains must have maximum efficiency in terminal operation if they are to fulfill their potential. I next take up the switching situation at Portland and Rivergate.

6. *Switching at Rivergate and Portland*

For maximum development, Rivergate must have economic, fast and reliable freight service provided by all the linehaul railroads, individually and as a group. An essential link in good rail service is the fast and efficient handling of trains and cars in terminal areas. Hence Rivergate's concern here is as to efficiency of Peninsula Terminal as a carrier switching Rivergate industries through the northern gateway.

At present, rail service at Rivergate moves through the northern gateway via Peninsula Terminal and the southern gateway via UP's Barnes Yard. Peninsula Terminal has its junction with the SP&S Group and UP at North Portland. It is within the Portland switching district. UP and SP&S are the only linehaul railroads now having direct access to the northern and southern gateways to Rivergate. SP&S also handles traffic from or to Rivergate on behalf of its parent lines, GN and NP.

Southern Pacific's nearest point to the northern gateway is East Portland where it connects with UP. East Portland is 6.75 miles from Peninsula Terminal over UP's main line. SP seeks bridge trackage rights over this line in Finance Docket Nos. 24679 and 24680.

Milwaukee's lines now end at Longview, Washington, about 46 miles north of Portland. In the Northern Lines merger decision (331 I. C. C. 228, 276), the Commission provided "for the opening of Portland to Milwaukee" as a condition of approval of the merger.

The Port's position as presented by witness Dirker is that the development of Rivergate requires that all linehaul railroads serving Portland have direct access to Rivergate and that joint ownership and operation of Peninsula Term-

inal by all the Portland linehaul railroads will promote the needed direct access of such carriers to Rivergate.

The old-fashioned method of uncorrelated transfer of freight cars from one carrier to another within the switching district will not provide Rivergate with the rail service it needs. In my experience, in terminal areas with complex switching such as Portland, the rhythm of one switching operation is so out-of-step with the next in the chain that a minimum of 24 hours is consumed for each transfer. On this basis, cross-Portland switching routes may sometimes take as much as three to four days. Trucks perform such cross-city movements in a few hours or less.

To illustrate the situation, tariffs show East Portland as point of interchange between UP and SP. With such an interchange, UP would move the cars to Albina Yard, there to rest until the next switch run to Peninsula Terminal, there to rest until the switch into Rivergate. In actual practice, I understand, one of these switch moves is sometimes eliminated; under an agreement with UP, SP handles some trains directly to or from UP's Albina Yard.

This illustration points up the inefficiency involved if the SP, a major linehaul carrier, does not have direct access to Rivergate through Peninsula Terminal. Of particular importance is the need for the direct terminal movement of unit, semi-unit and container trains, whether by UP, the SP&S Group, SP or Milwaukee linehaul.

A word about Milwaukee's situation. Milwaukee and its friendly connection and possible merger partner, CNW, serve the great midwestern granaries. Unit or semi-unit trains of grain from the Midwest via these lines should move to Rivergate for processing for domestic distribution or for export. If under the Northern Lines case, Milwaukee has the right of access to Peninsula Terminal, its

unit trains could move direct to Rivergate's northern gateway. But if not, the trains would have to go through an interchange with GNPB at Hoyt Yard in Portland or at Vancouver or with UP in Portland for movement via North Portland or Barnes Yard. The terminal delay and additional operating costs are, in my opinion, unnecessary and unjustifiable. As I have shown, the efficient way for unit trains is to have direct access to or from Rivergate, regardless of which carrier handled the train in linehaul operation.

Several points require discussion here:

First, Peninsula Terminal's present facilities could not efficiently handle unit trains and heavy volume to and from Rivergate. As shown by ground inspection and the map attached to the 24679 application, difficult track conditions exist from the UP-SP&S connection with Peninsula Terminal at North Portland over Pninsula Terminal's line to a tail track and thence in a reverse direction, through an underpass beneath SP&S to Rivergate. Doubtless, this undesirable track pattern is adequate today, since Peninsula Terminal now serves only one industry in Rivergate, which lies just beyond the boundary line at the northern gateway. My testimony has shown that Peninsula Terminal will be useful as the northern gateway to Rivergate only if it can handle unit and semi-unit freight trains of 100 cars or more.

Second, as Exhibit No. 2 shows, a maximum of eight trains would be operating within Rivergate each day. Even with all eight trains there at one time, the trains would be of sufficiently different assignments to avoid serious interference with each other.

Third, it is my judgment that running track ownership by the Port within Rivergate is a second present policy. However, when Rivergate's rail transportation has been

fully developed, the Port could then consider ownership of Rivergate's running tracks by all the linehaul railroads.

Fourth, I have already noted that UP switches for SP&S the Rivergate traffic brought by SP&S into or taken from Barnes Yard. Consideration might well be given to SP&S becoming the switching line for all the railroads through the northern Peninsula Terminal gateway. This would apply, of course, only to other than unit trains since the latter, being never uncoupled, should move without engine change or other terminal delays and do not require switching service.

7. *Conclusion*

Joint ownership of Peninsula Terminal by all Portland linehaul railroads will promote adequate rail service for Rivergate for the short term. For the long term, equal access to Rivergate's northern gateway for all Portland linehaul carriers would provide Rivergate with optimum rail service. Joint use of Peninsula Terminal tracks by all the linehaul railroads can best develop through their joint ownership.

Plainly Rivergate as a key project in Portland's industrial and commercial expansion must have optimum rail service. Joint ownership by all Portland linehaul railroads of Peninsula Terminal is a first step in obtaining this optimum service. It is essential to the future plans of Rivergate, Portland, the State of Oregon and the Nation to have unit train, semi-unit train, TOFC-COFC and industrial switching service to and from all linehaul railroads serving Portland.

I emphasize again my basic view that single-car switching to and from small industries with a so-called one-car side-track has become obsolete. It is not only an inefficient method because of engine and crew cost, but is obsolete

because the truck performs this type of service better and faster. TOFC-COFC rail service is efficient because its cars are handled in blocks and because idle days when the freight car is standing still are reduced. The box car is gradually being replaced by the container and/or the truck trailer.

Rivergate's future will be less advantageous for Portland and much more costly for the rail carriers if obsolete switching procedures are more necessary through failure to provide efficient operating conditions for the unit, semi-unit, TOFC-COFC and industrial switching trains of all the linehaul carriers. Ownership of Peninsula Terminal by all the Portland linehaul carriers will make possible the treatment of Rivergate as a single unified and efficient switching district.

EXHIBIT 4.

STATEMENT OF WILLIAM S. DIRKER, JR.

1. *General*

My name and business address are William S. Dirker, Jr., The Port of Portland Commission, P. O. Box 3529, Portland, Oregon, 97208.

I graduated from Stanford University and then attended the Graduate School of Business at Stanford. My work experience is as follows:

1948-1951	Portland Hide and Wool Company Assistant Manager
1951-1953	Oregon Steel Mills Assistant Personnel Manager
1953-1961	Steel Construction Company Office Manager

1961-1963 The Port of Portland
Administrative Assistant to General Manager

1963-1967 The Port of Portland
Manager, Research and Planning Department

Oct. 1967 The Port of Portland
Manager, Special Projects Department

In the course of my work as manager of the Research and Planning Department most of the economic analysis and planning for the Rivergate Industrial District referred to later was completed. Some of this was done under my direct supervision and some under my general supervision.

The Port of Portland was created in 1891 by the Oregon State Legislature and has since been active in developing port and other facilities for use by various modes of transportation in the Portland District. These include the Rivergate area at the confluence of the Willamette and Columbia River adjacent to the North Portland Peninsula in the district.

The Port has intervened in these cases to protect the public interest in providing the important Rivergate area with adequate transportation service.

In this statement, I first present The Port's position, then set out various economic facts pointing to the importance of Rivergate as a major factor in the growth of Portland and Oregon as well as the domestic and foreign commerce of the Nation, and conclude with a description of Rivergate its development and its need for adequate and economic rail service.

2. *Rivergate, the Columbia-Willamette System and The Port of Portland's Position*

The Columbia-Willamette system is the second largest river improvement in the United States. The Portland District lies at the confluence of the Columbia and the Willamette 100 miles from the Pacific Ocean. The Port since 1891 has actively participated in the river improvement from a 25-foot channel to the present nearly-completed 40-foot channel able to take large ocean-going vessels between Portland and the sea.

Both the Federal government and The Port of Portland have made substantial expenditures in the Columbia-Willamette River navigation system. As of December 31, 1967, those expenditures totaled about $120 million.

The Port has supported and developed various facilities and projects in the district. These I shall later describe.

Rivergate is of immediate concern in these cases. It lies at the very confluence of the two rivers and is now in the initial stages of development. For the most part, it is undeveloped. In preparation for its development, Rivergate has been studied in depth by The Port staff and by professional consulting and other organizations. Recently, in 1965, Battelle Memorial Institute of Columbus, Ohio, prepared a land demand study. The Industrial Council Executive Group of the prestigious Urban Land Institute evaluated the project. In September 1967, the consulting firm of Daniel, Mann, Johnson & Mendenhall (DMJM), of Los Angeles, completed a comprehensive study of Rivergate and the North Portland Peninsula. In addition to ten years of active study by the professional Port staff, the Port has expended about $400,000 on outside consultants. The City of Portland and the County of Multnomah have also participated in these studies and have made significant staff contributions.

Rivergate has been discussed with rail and other carriers informally and at several conferences. The Freight Interchange Conference was held in Portland on July 13-15, 1966 and the Portland Railroad Conference on June 20, 1967.

My Exhibits 5 and 6 fix the location of Rivergate in the Portland District. For a generalized view, Exhibit 5 shows the North Portland area plan. The left portion of the map is colored and is the area of concern in this case. This area, west of the main line of the Spokane, Portland, and Seattle Railway, includes Rivergate Industrial District and the Dock Commission's Terminal 4. As indicated by the legend, the green parallel lines show the location of the few industries in operation or under construction in the Industrial District.

My Exhibit 6 is the detailed plan for Rivergate Industrial District which is owned by The Port of Portland. This map shows in some detail transportation features and areas of use contemplated as the result of economic analysis and physical planning. Both transportation and use are necessarily tentative.

These cases before the Interstate Commerce Commission bring to a head the question of rail service to Rivergate. At its meeting on January 8, 1968, The Port of Portland Commission adopted a resolution stating its position in this matter as follows:

1. The full development of the Rivergate area will be of great economic value to the greater Portland area and to the entire Pacific Northwest.

2. Adequate service to the Rivergate area by rail and other modes of transport will enhance the domestic and foreign trade of the United States.

3. Sound transport logistics for the Rivergate area are essential in promoting the rapid industrial and commercial development of the Rivergate area.

4. The development of the Rivergate area requires that all railroads serving Portland have direct access to the Rivergate area on fair and reasonable terms.

5. Joint railroad ownership and operation of Peninsula Terminal Company by all railroads serving Portland will promote the needed direct access of such carriers to the Rivergate area.

3. *Description of the Growth of Portland and Oregon*

To put this case in perspective, I first comment briefly on the growth of Oregon and Portland. Oregon has traditionally been a resource-based economy, largely in forest products and agriculture. The western one-third of Oregon consists of mountains and valleys which contain the bulk of the State's timber, agriculture, manufacturing, and population. The eastern two-thirds of the State is semi-arid and sparsely populated, and has few centers of economic concentration. We have been essentially a net exporter of raw products and an importer of finished goods. In many ways we have been an economic colony of the more populous manufacturing centers of the East and have exhibited many of the characteristics of a colony. Over the last 25 years, our growth has been strong, well ahead of the national average, at a rate slightly ahead of the rate of Washington, but about half of the rate of California, our booming neighbor to the south.

Population in Oregon, certified by the Center for Population Research and Census, Portland State College, as of July 1, 1967, was 2,006,360, or about one percent of the Nation's population. Distribution of population through-

out Oregon and the Northwest is well illustrated on my map Exhibit 7. Over 40 percent of the State's population is located in the Portland area. The projected growth rates for Oregon are anticipated to level off to slightly below the national average during 1965-74 and rise to about the national average during 1975-84.

The population of greater Portland (Portland Standard Metropolitan Statistical Area) has increased from 501,000 in 1940 to 889,000 in 1965. It has been projected to 1,081,500 in 1975 and 1,440,000 in 1990. The Portland SMSA includes Multnomah, Clackmas, and Washington Counties in Oregon and Clark County in Washington.

My Exhibit 8 details the employment base of Oregon broken down by Standard Industrial Classification (SIC). Of particular interest is the declining trend in agriculture and the sharp rise in manufacturing and services. The State's transition from its former "colonial" status is further illustrated in my Exhibit 9 showing a decline in lumber and wood products manufacturing and a sharp increase in other manufacturing at a rate rising faster than the United States as a whole.

The increasing emphasis on manufacturing as well as on wholesale and retail trade and services is even more noticeable in the Portland area. This is shown by my Exhibit 10. As contrasted with Seattle and Los Angeles, the Portland area ranks low on a per capita basis as a manufacturing center. However, the area is becoming increasingly oriented toward manufacturing.

On the other hand, the diversity and stability of the Portland economic base is demonstrated by the data in my Exhibit 11. Taking the employment mix of the United States as 100, the table in this exhibit ranks the various metropolitan areas in the order of how nearly they fitted

the national profile in 1960. Philadelphia was the most diverse with an index of 73.0. Portland ranked fifth with an index of 56.3. Note how this compares with the index of 11.8 for Seattle, which is so heavily committed to aircraft manufacturing.

The future of Oregon and Portland clearly depend upon how effectively we meet the challenge to expand the manufacturing, trade and transportation base of this area. Rivergate is the keystone of the opportunity for the future development of Portland and Oregon. It is also the keystone to its progress as a distribution and transportation center. This subject I discuss in the next section of my statement.

4. *Portland as a Distribution and Transportation Center*

Portland has been historically a major distribution and transportation center for the Pacific Northwest. This fact clearly appears in my map Exhibit 12 depicting the fundamental geography of the Northwest. As the Northwest's leading port, Portland lies 100 miles inland at the center of the hub of a vast, highly developed competitive transportation network radiating in all directions from Portland.

The growth of Portland as a wholesale and retail trade center is dramatically shown by the data below.

Growth of Wholesale Trade and Retail Sales

Wholesale trade in 1954	$1,840,194,000
Wholesale trade in 1963	$3,464,537,000
Percent increase	88.3%
Retail sales in 1954	$ 901,306,000
Retail sales in 1963	$1,279,337,000
Percent increase	41.9%

Comparison-Ratio of Wholesale Trade to Retail Sales

Ratio in 1954	2.04
Ratio in 1958	2.38
Ratio in 1963	2.85

Comparison-1963 Per Capita Wholesale Trade

Los Angeles-Long Beach SMSA	$2,613
Seattle SMSA	$2,692
San Francisco-Oakland SMSA	$3,489
Portland SMSA	$4,029

Source: Census of Business and Current Population Report, P-25, U. S. Department of Commerce, Bureau of the Census

As indicated by the last comparison (per capita wholesale trade), Portland, for its size, serves a much larger wholesale area than any of the other major West Coast centers.

The leadership of Portland as a distribution center for the Pacific Northwest is now established as shown by comparing public warehousing in Portland and Seattle in 1958 and 1963. The data below is taken from the United States Census of Business.

Public Storage of General Goods
(In Millions)

	Portland		*Seattle*	
	1958	*1963*	*1958*	*1963*
Floor space—sq. ft.	1.113	1.283	1.190	0.996
Revenue	$2.899	$5.063	$3.236	$2.705

New construction since 1963 gives Portland even greater leadership today. Moreover, Portland is closer than Seattle to the geographical center of the Pacific Northwest. Naturally it has gained from the rapid expension of manufacturing in California and the increasing flow of consumer goods northward.

Portland's leadership in the wholesale trade and distribution function may be illustrated in numerous ways. Let me give two examples: The Pacific Northwest headquarters for Volkswagen, the widely sold German automobile, is located in Portland; and all major manufacturers of general aviation aircraft maintain their regional headquarters in the Portland area.

Extensive transport facilities of all types provide service to and from Portland's market areas as well as to and from the various areas shipping traffic through the port. They may be summarized as follows:

(1) Railroad. Portland is served by five linehaul railroads, Union Pacific, Southern Pacific, Spokane, Portland & Seattle, Great Northern and Northern Pacific. I understand that if the Northern Lines merger becomes effective as approved by the Commission, one company, Great Northern Pacific & Burlington Railroad, will serve the Portland area in place of the last three named railroads. In addition, if the Northern Lines merger becomes effective, I understand that the Milwaukee Road will have the right to reach Portland directly. See my Exhibit 13 entitled "Schematic Outline of Principal Rail Lines Serving the Pacific Northwest, Effective on the Northern Lines Merger."

(2) Motor carrier. The Portland area is served by some 275 certified motor carriers operating over 10,000 units of equipment to, from and within the area. Of the 275 carriers, 51 are regular-route common carriers of general commodities. The balance are specialized or irregular route common carriers.

(3) Barge. The Portland-Vancouver area is served by 43 barge and towing companies. Of the 43, 18 are strictly towing companies while 25 out of the 43 own barges.

(4) Ocean. Numerous ocean vessels call at the port of Portland. The number of ship calls at Portland in 1966 was 1,673, a total in line with the experience in recent years.

(5) Air. Through Portland International Airport owned and operated by the Port, ten commercial airlines (Braniff International, Continental, Eastern, Flying Tiger, Northwest, Pacific, Pan American, West Coast, Western and United) provide airfreight service to and from all parts of the country and the world.

These carriers move large tonnages of freight to and from the Portland area and through its port. In the next section, I review this traffic to show the importance of Portland as a transportation center and to provide the basis for determining Rivergate's future need for adequate transportation by all modes of transportation, particularly rail.

5. *Freight Traffic—Oregon and Portland*

Portland's economic function as a wholesale trade, distribution and manufacturing base for the Pacific Northwest and as the Northwest's principal port leads inevitably to large volumes of freight traffic. Details concerning this traffic are developed in my next series of exhibits. The exhibits are largely self-explanatory and may be summarized as follows:

My first three exhibits show the importance of Oregon and Portland with respect to rail traffic. My Exhibit 14 tabulates the total carloads and tons of rail traffic originated and terminated in Oregon by Class 1 railroads for the years 1960 to 1966, inclusive. Tons originated have increased from 14.2 million in 1960 to 16.9 million in 1966, and tons terminated from 6.9 million in 1960 to 8.8 million in 1966.

My next Exhibit 15 is a map showing the origin and destination states and regions in the 1965 University of Oregon traffic study used in my next exhibit.

My next Exhibit 16 shows in tabular form by states and regions the origin and destination of Oregon rail traffic in 1960. As indicated by the source cited in the exhibit, the commodity groups are those used by the Interstate Commerce Commission. Page 3 of this exhibit combines and totals by major commodity groups the origin and destination tonnages to and from Oregon in 1960 as shown on pages 1 and 2 of the exhibit.

My Exhibit 17 tabulates the barge and towboat traffic, in tons, handled on the Columbia-Willamette Rivers to and from the Portland-Vancouver area for the years 1960 to 1966, inclusive. In this seven-year period, the tonnage ranged from 5.9 million to 7.1 million tons.

Portland has been improving its position as a port for the transshipment of oceanborne commerce. In 1965 Portland ranked 12th among all U. S. ports in tons of oceanborne commerce. The following data shows its sharp growth in oceanborne commerce as compared with Seattle.

Amount & Growth of Oceanborne Commerce: 1955-1965	
Portland—1955 (short tons)	8,535,868
Portland—1965 (short tons)	10,489,989
Percent increase (decrease)—1955-1956	22.9%
Seattle—1955 (short tons)	7,131,056
Seattle—1965 (short tons)	6,602,839
Percent increase (decrease)—1955-1965	(7.4%)

My Exhibit 18 compares foreign imports and exports, in tons, through Columbia River and Puget Sound ports. The Columbia River ports had a rate of growth nearly double that of Puget Sound. Another measure of the

rise of Oregon and its customs district is shown by my Exhibit 19 recording the value of waterborne imports and exports from 1954 to 1966, inclusive. This compares the customs districts of Oregon, Washington, San Francisco and Los Angeles. The Oregon customs district is by far the fast growing port area on the Pacific Coast.

My Exhibit 20 records the airfreight through Portland international Airport for the eight years from 1960 to 1967, inclusive.

6. *The Rivergate Area at Portland*

In this concluding section of my statement, I discuss and describe The Port of Portland's Rivergate Industrial District and consider generally what comprehensive rail service means to Rivergate.

At the time of its creation in 1891, the Port's primary purpose was to dredge a channel between Portland and the sea and to make the products of Oregon available to world commerce. Since that time, the Oregon legislature has added repeatedly to the Port's responsibilities and powers. Today it is charged with the promotion of "maritime, shipping, aviation, commercial, and industrial interests of the Port." To accomplish these purposes, the Port has the power, among other things, to levy taxes, issue bonds, exercise the right of eminent domain and own and operate wharves, piers, drydocks, warehouses, elevators, railroads, steamships, barges, river boats and towboats.

In its early years, the Port did extensive dredging of the Columbia and Willamette Rivers and at one time operated in the rivers as many as five of the largest dredges in the world. A major problem in dredging is the disposal of the spoil dredged up from the river bottom by the hydraulic

pipeline dredges. In the 1920's, for example, the Port used major spoil from the river to create the Swan Island area which then became Portland's first airport and later the present Swan Island Industrial Park.

Rivergate is a part of this spoil disposal program, but more importantly, it is a vital part of the future industrial and economic development of Portland and the Northwest. Originally, Rivergate was mostly low-lying marsh land subject to flooding at various times of the year. The Port first acquired land in the Rivergate area in the 1940's as a spoil disposal area. Gradually acres were added, and the land was filled to usable elevations.

Meanwhile, the Port staff was studying the future use of the area. I have already referred to the recent studies of the area. But our studies, in fact, go back at least ten years to 1958. In that year, a consulting engineering firm prepared a land use study and recommended industrial use of this area. Again in 1961 a consulting firm analyzed a number of other potential industrial sites in the Portland area and lower Columbia and concluded that there was no site superior to Rivergate upon which to expand the industrial base of the region's economy. At this time, the Port owned about 600 acres. Numerous other topographical surveys, soil investigations, land use, traffic and other studies were prepared up to 1965. Then came the Battelle and DMJM studies along with the purchase of additional acreage. Thus today the Rivergate Industrial District consists of almost 3,000 acres and has completed the major part of its planning stages.

Rivergate involves major public and private investment. The Port has already invested over $5 million. The high-capacity arterial access along the Columbia-Swift Boulevard Route will involve a public expenditure of over $2

million. The Port's new dredge OREGON, a 5,000 horsepower, 30-inch pipeline dredge, continues to fill land in the Rivergate area and will continue to do so for numerous years.

Rivergate is still in its developmental stage. Most of the land is unoccupied; much of it has yet to be reclaimed. A few industries occupying about 265 acres of land operate or will operate near the southern boundaries. These include, on the west side, Ashgrove Lime and Portland Cement Company for a chemical lime plant, 30 acres; Cometco Division of Consolidated Freightways for an aluminum foundry, 20 acres; Collier Carbon and Chemical Company, on affiliate of Union Oil Company for a urea packaging plant, 25 acres; and Oregon Steel Mills, a division of Gilmore Steel Company for an integrated steel mill, 150 acres; and on the east side, Crown Zellerbach Corporation for a pole yard, 40 acres.

The Port estimates that it will expend a minimum of $50 million in the development of Rivergate. Other public agencies will invest over $200 million in response to the need for facilities. A conservative estimate of the ultimate public and private investment exceeds $500 million.

I should comment on two features of the planning:

First, I have already presented the precise plan of the Rivergate Industrial District as my Exhibit 6. I call attention to certain feature of the plan as it pertains to railroads. The present plan contemplates two loops, one through the interior of the industrial area, and one exterior and adjacent to the barge basin. Both are tentative in view of the undeveloped character of Rivergate. These major loops are designed to accommodate unit and semi-unit trains, and both loops will connect with the linehaul

railroads through Peninsula Terminal and the Union Pacific's Barnes Yard. Rivergate will have facilities for handling TOFC-COFC traffic. All the industrial sites are intended to have access to rail and truck service; and The Port will certainly protect transportation service to and from waterfront industries. Dr. Plowman, in his testimony, will cover the transport needs of Rivergate.

In the case of Rivergate and the Peninsula, the demand for the uses of the land was first identified, and then the physical planning undertaken, and not the reverse, as is often the case. This feature has prevailed along with careful planning of other aspects. Let me list the nature of various information developed in recent years by public bodies and private consultants in cooperation with, or sponsored by, The Port.

Trafficway studies by Oregon State Highway Department; aerial photographs by the United States Geodetic Survey and private contractors; Land For Industry study by Metropolitan Planning Commission; land use studies by Cornell, Howland, Hayes & Merryfield; economic demand studies by the Battelle Memorial Institute; soil studies by Dames & Moore; aerial topographic surveys by K. B. Wood & Associates; terminal facilities information from Arthur D. Little, Inc.; and the comprehensive 1967 DMJM Study to which I have already referred.

In all our Rivergate studies and conferences, transportation has been carefully considered. I have already referred to the recent transportation conferences held in Portland, the Freight Interchange Conference on July 13-15, 1966 and the Portland Railroad Conference on June 20, 1967. At the first conference, for example, an important part of the report prepared by DMJM for The Port concerned the activities, future plans, and prospects of the

major carriers. The statement of the conference purpose included consideration of "the most efficient manner of handling freight perhaps through a new approach to the design or concept for an interchange function and facility" for Rivergate and the North Portland Peninsula area.

To illustrate how the various conferences and studies have directed our attention to transportation, I present my Exhibit 21 which contains a few excerpts of the report made by the Urban Land Institute to The Port as sponsor of a panel convened in Portland on July 19-23, 1965. The Institute, headquartered in Washington, D. C., is an independent, nonprofit organization to study and report on trends affecting urban real property and to advance research and education in the planning, development and rebuilding of urban areas. In this instance, the panel consisted of six men who came from all parts of the country and were experienced in real estate industrial development.

Our continuous study of transportation as a vital factor in Rivergate's development is basic to The Port's present position in these cases. Its position is also supported by the expert advice of consultants experienced in evaluating the needs of new industrial districts such as Rivergate and by The Port's experience in locating new industries in Rivergate.

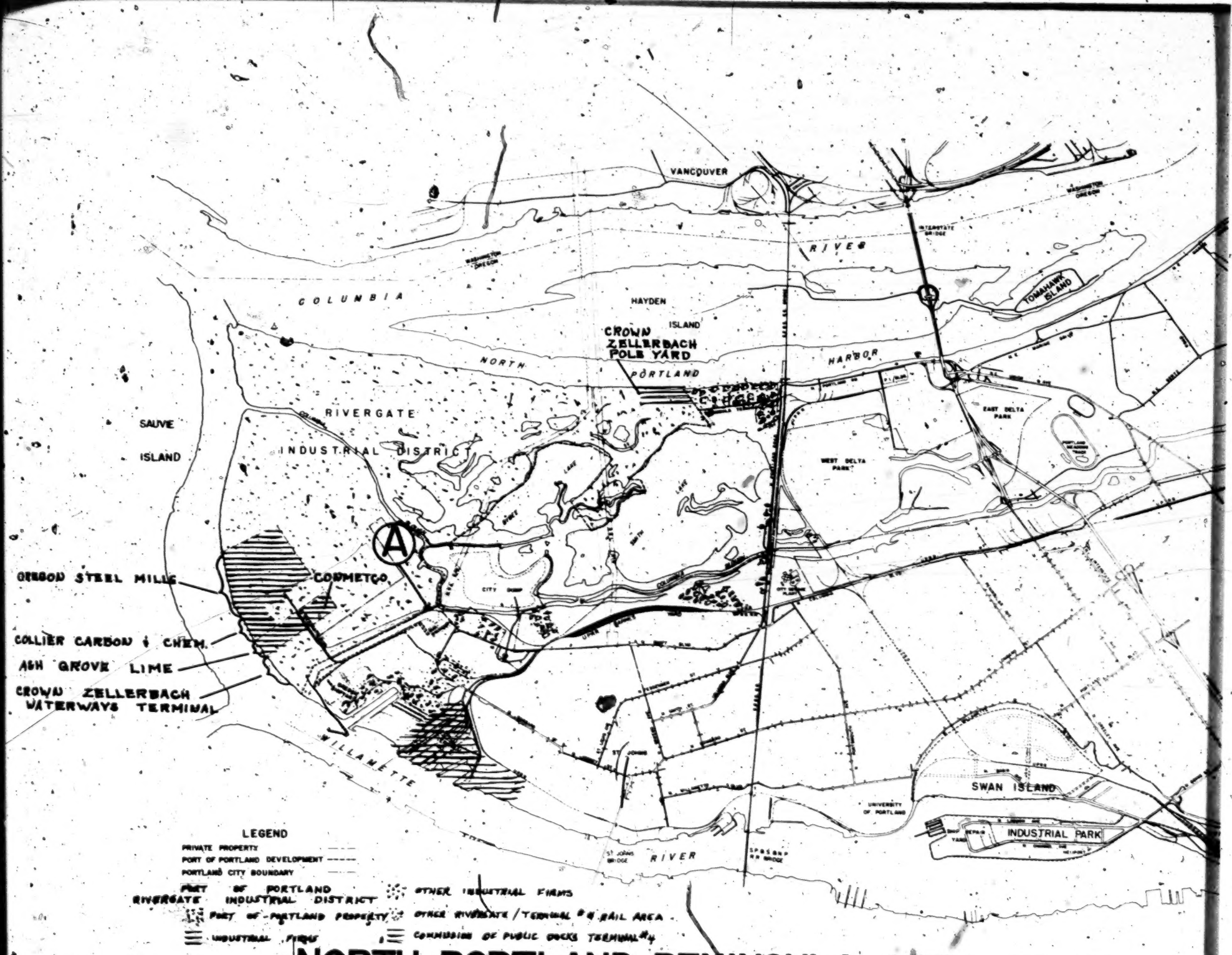
Oregon's traditional economic base, particularly the forest products industry, now has some elements of adversity. With the growth of population and markets in the Pacific Northwest, The Port of Portland is trying to meet its responsibilities by developing Rivergate so as to expand the manufacturing and distribution base of the area. The Port Commission and much of the community believe that the success of Rivergate will be the fulcrum upon which the economic vitality of this region will hinge.

Having the long experience of marketing and research behind us and recognizing the changes now occurring in transportation technology, The Port supports joint railroad ownership and operation of Peninsula Terminal by the linehaul railroads serving Portland. For the proper development of Rivergate, The Port strongly urges that all railroads serving Portland have direct access to Rivergate on fair and reasonable terms. The Port does not undertake to develop or suggest the means for this direct access. It leaves that matter to the Commission and the railroads. The Port's concern is this: The means of direct access must assure that Rivergate will have the fast, economic and efficient rail service necessary for the proper development of Rivergate in the best interests of Portland, the State of Oregon, the Pacific Northwest and the Nation.

EXHIBIT 5A.

Witness: W. S. DIRKER.

The map showing North Portland Peninsula Area plan is reproduced on the next page without color.



NORTH PORTLAND PENINSULA AREA PLAN

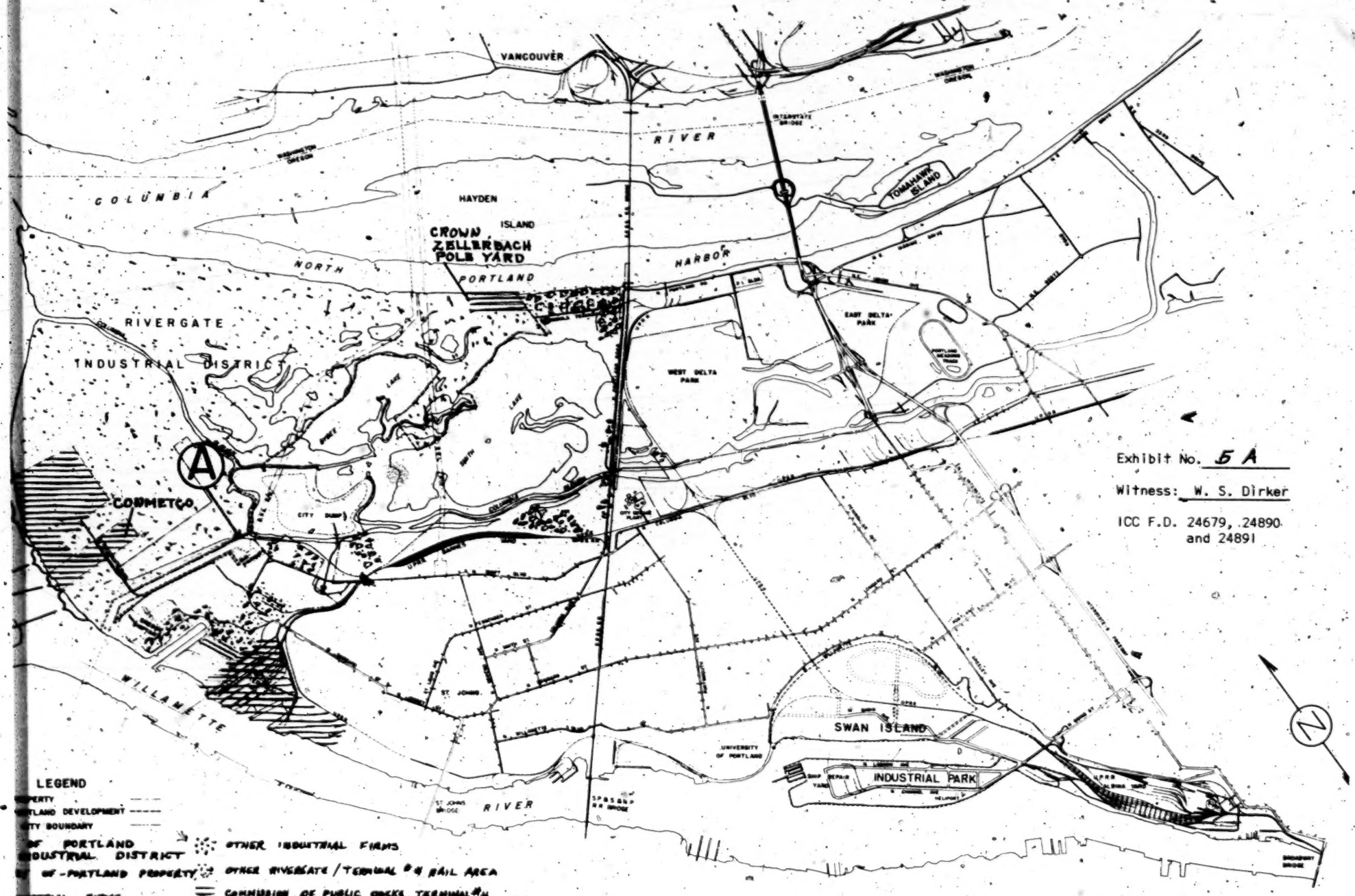


Exhibit No. 5A

Witness: W. S. Dirker

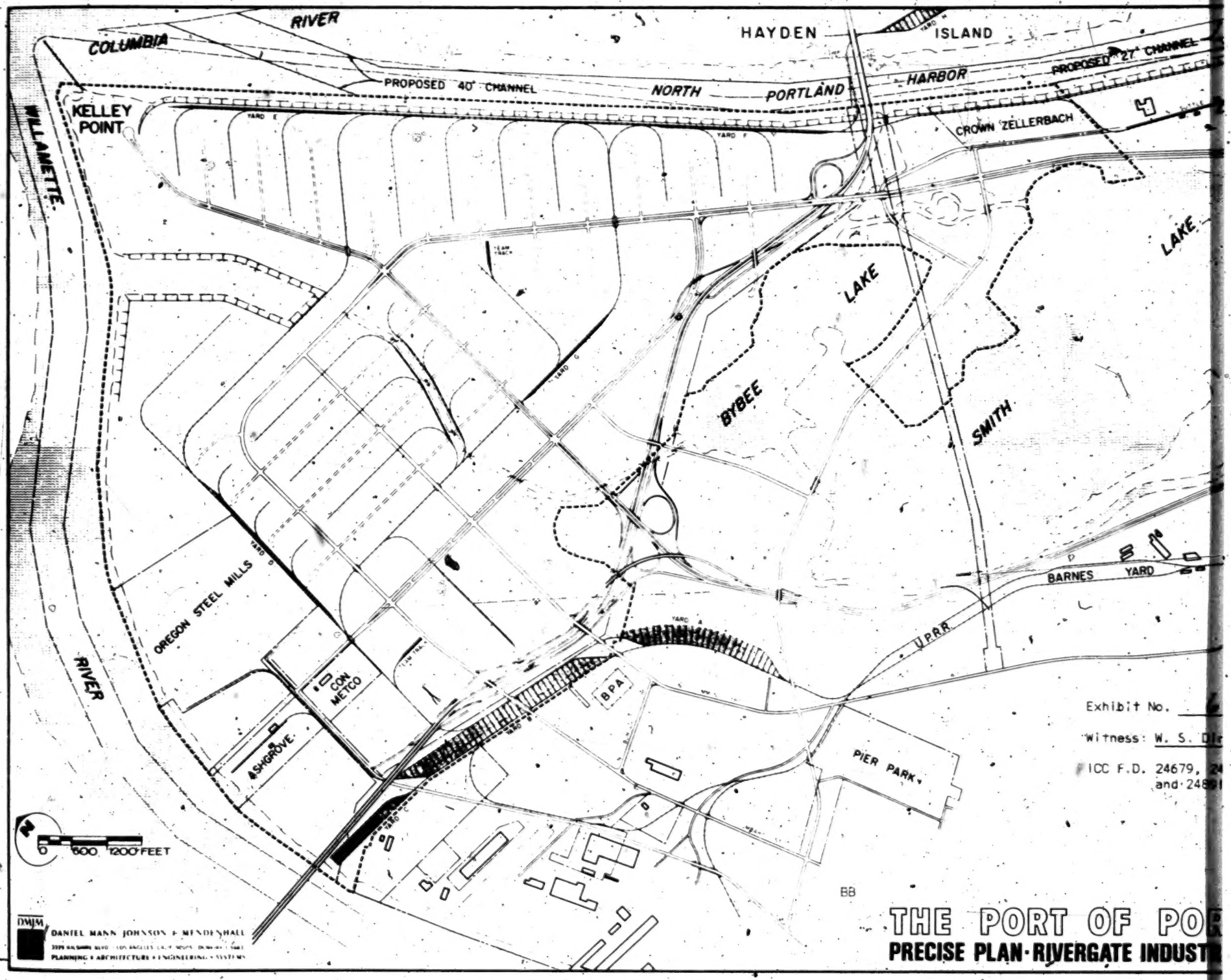
ICC F.D. 24679, 24890 and 24891

NORTH PORTLAND PENINSULA AREA PLAN

THE PORT OF PORTLAND
PORTLAND, OREGON
MAY, 1986

DRAWING BY: CHDS, SEPT., 1985 APPROVED
UPDATED BY: R&P DEPT., MAY, 1986 DRAWING NO.

5H


COLUMBIA RIVER
HAYDEN ISLAND
PROPOSED 40' CHANNEL
NORTH PORTLAND HARBOR
PROPOSED 27' CHANNEL
KELLEY POINT
WILLAMETTE RIVER
CROWN ZELLERBACH
LAKE
BYBEE LAKE
SMITH LAKE
OREGON STEEL MILLS
CON METCO
ASHGROVE
BPA
PIER PARK
BARNES YARD
UPRR
YARD E
YARD F
YARD G
YARD H
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DANIEL MANN JOHNSON & MENDENHALL
PLANNING • ARCHITECTURE • ENGINEERING • SYSTEMS
Exhibit No.
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PRECISE PLAN · RIVERGATE INDUST

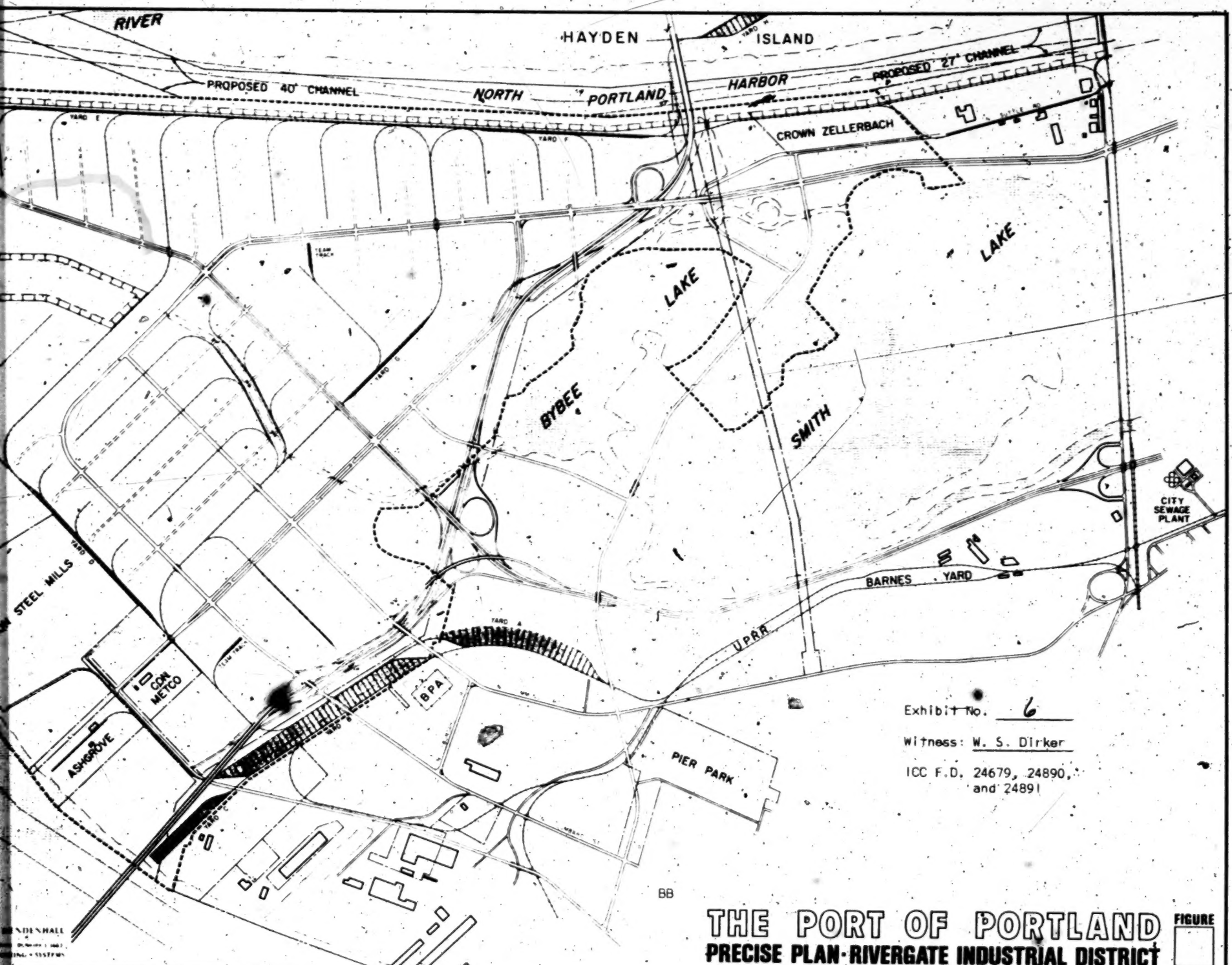


Exhibit No. 6

Witness: W. S. Dirker

ICC F.D. 24679, 24890, and 24891

THE PORT OF PORTLAND

PRECISE PLAN · RIVERGATE INDUSTRIAL DISTRICT

FIGURE

EXHIBIT 6.

Witness: W. S. DIRKER.

The map on the preceding page shows the Precise Plan, Rivergate Industrial District, and is reproduced without color.

EXHIBIT 22.

STATEMENT OF ALFRED M. ESCHBACH.

My name is Alfred M. Eschbach. I am Chief Engineer of the Commission of Public Docks of the City of Portland, Oregon. My address is 3070 N. W. Front Avenue, Portland, Oregon 97210.

I have had 28 years of engineering experience in the fields of management, planning and construction. I received a Bachelors Degree in Civil Engineering from Washington State University and a Masters Degree in Civil Engineering from Cornell University. I served for 20 years with the U. S. Army Corps of Engineers, retiring with the rank of Colonel in 1958. From 1958 to 1963 I was Director of Public Works for the City of Spokane, Washington. Since 1963 I have been Chief Engineer of the Commission of Public Docks, Portland, Oregon. I am affiliated with the following professional organizations: American Association of Port Authorities, Member of Engineering and Maintenance Committee; American Society of Civil Engineers; National Society of Professional Engineers; Society of America Military Engineers.

The Commission of Public Docks is an autonomous arm of the City of Portland Municipal Government. It is charged with the responsibility of providing facilities for the accommodation of the city's maritime commerce and with the protection and development of that commerce.

The Commission of Public Docks at its regular meeting on Thursday, January 4th, took formal action in support of the Port of Portland Commission's intervention in this case, and took the position that acquisition of the Peninsula Terminal Railroad by all of the railroads serving the area would best serve the needs of the area and the community. Our support of this case has two goals:

First, and directly is continued adequate rail service now, with improved and broadened rail service for the future to and from dock facilities in the Rivergate area. Equal, efficient and unencumbered service by all possible railroads is the essential and critical element to this objective.

Secondly—present and future economical and adequate rail service to and from the entire Portland complex.

In discussing these two goals, I will describe the facilities provided at Portland for the handling of ocean and river commerce, particularly the Dock Commission's present and proposed facilities in the Rivergate area. I shall also show the importance of Portland as the leading seaport in the Pacific Northwest.

The Commission owns and operates 21 ocean berths. In the inner harbor near downtown Portland are 3 terminals, all of which handle general cargo almost exclusively. They are Terminal 1—6 berths, Terminal 2—3 berths, and Albina Dock—2 berths. Under construction at Terminal 2 is a new two berth complex which, when completed, will be a flexible multi-purpose 25 acre facility designed to serve both container ships and vessels carrying conventional cargoes. Downriver in the Rivergate area referred to as the outer harbor, is Terminal 4, a 10 berth terminal of 155 acres. Located at Terminal 4 is the Commission's grain elevator with a storage capacity of 8 million bushels—the largest

elevator on tidewater west of the Mississippi. The grain facility is leased to Cargill, Inc. and ships between 30,000,000 and 40,000,000 bushels of wheat per year. Terminal 4 is also the location of the Commission's commercial bulk handling facility. Here on Pier 4 is a bulk unloading pier equipped with a Dravo straight line bulk unloader tower with a rated free digging capacity of 900 tons per hour. Scheduled for delivery this coming March 15th is a new container crane which will be erected on Pier 2, providing the finishing touches to Portland's first full scale container facility. The facility presently handles containers with conventional cranes. The Commission has invested two million dollars in dock reconstruction and container equipment to serve this container facility specializing in this new method of cargo transfer. Outbound bulks also move through Terminal 4.

This combination of grain, bulk, container and conventional general cargo facilities creates a complex which generates the major portion of rail traffic to and from all Dock Commission facilities. Today this multi-purpose terminal accounts for more than half the Commission's revenue tonnage not including grain. The center of gravity of Portland's commercial harbor shows a history of movement downriver from its early day location. For example, all commercial docks except one grain elevator are now located downstream from the Broadway Bridge. The harbor's petroleum facilities are also located in this lower harbor.

The Port of Portland's Rivergate study indicates an acceleration in the desire of industry to locate in the downriver area. The Commission of Public Docks recently acquired additional property adjoining its Terminal 4, and when developed, this property will provide 110 acres for expansion.

The total of Portland's waterborne commerce is handled over both private and public docks. The Commission is concerned chiefly with general cargo of which almost 100% moves over its facilities, and with those commercial bulks and other cargoes for which proprietary facilities are not available. The sum of the cargo handled at Portland's private and public facilities makes Portland the second largest port on the West Coast of the United States, second only to the huge Los Angeles-Long Beach complex. The latest available figures from the U. S. Army Corps of Engineers Waterborne Commerce of the U. S. revealed the following rankings among the principal ports of the U. S. Pacific Coast. These figures are rounded off.

Total Waterborne Commerce

1.	Los Angeles-Long Beach	34,000,000 tons
2.	Portland	16,700,000 tons
3.	Seattle	14,700,000 tons
4.	San Francisco-Oakland	10,000,000 tons

Foreign Commerce

1.	Los Angeles-Long Beach	19,000,000 tons
2.	Portland	4,500,000 tons
3.	San Francisco-Oakland	3,140,000 tons
4.	Seattle	2,550,000 tons

Of-Shore Commerce, Foreign & Coastwise

1.	Los Angeles-Long Beach	32,000,000 tons
2.	Portland	10,500,000 tons
3.	Seattle	6,550,000 tons
4.	San Francisco-Oakland	5,640,000 tons

Portland's tonnage continues to grow. Off-shore tonnage in 1967 was 12.7% over 1966 and the over-all tonnage over Commission facilities increased 8% in the same period. In the past 13 years The Commission of Public

Docks invested $22 million in capital improvement of its maritime terminals. The Commission plans an additional $16,800,000 capital program over the next 10 years and will go to the voters of the City of Portland in the May 28th Primary Election to seek general obligation bond authorization to finance $12,500,000 of that program. The remainder will be financed from the Commission's annual earnings.

The bond fund will accomplish the following:

1. $3,283,000 to provide and adapt the new Terminal 2 complex to the point where it will be the best container conventional cargo terminal that can be built. The amount earmarked includes funds for a container crane, transit shed and supporting rail, highway, container yard and service project.

2. $7,000,000 to provide the basic dock structure and back-up facilities for a new two berth facility. A duplicate of Terminal 2 emphasizing the container handling capability of the multi-purpose concept.

3. $1,250,000 to upgrade existing facilities at Terminal 1 and 4 to provide added dock strength and dock area as necessary for the heavier concentrated loads of packaged cargo and the equipment necessary for its handling.

4. $500,000 to construct a specialty dock to accommodate sideport and roll-off roll-on cargoes.

5. $500,000 to provide water pollution abatement from all Commission facilities.

In addition Commission earnings of $4,270,000 will be used for an eight point program of general upgrading construction, equipment acquisition and property acquisition.

The 110 acre expansion area adjacent to Terminal 4 mentioned above, is being seriously considered as the site for the next echelon of Dock Commission terminal construction. Should this be the final site selection, the $10,550,000 of the 10 year $16,800,000 capital program will be expended in this portion of the Rivergate area.

I have been informed about the so-called northern line merger which, if carried out, will consolidate various railroads serving Portland. The Milwaukee Railroad, I understand, will have direct access into Portland of the merger becomes effective. Our Terminal 4, as expanded, should have efficient direct rail service to and from all areas of potential cargoes. If our expanded facilities are to prosper under the changing railroad technology, the rail service must fit the needs of this commerce and must be economic and rapid. I mean that the railroads serving Rivergate should serve our dock areas with large volume service expeditiously and at the lowest possible cost. The Union Pacific and the Spokane-Portland and Seattle Railroad now have access into and out of the Dock Commission areas on the south side of Rivergate. The Peninsula Terminal Railroad is and will be part of the railroad logistics of the total Rivergate area.

The Dock Commission supports the Port of Portland's position, desiring joint ownership of the railroad by all the railroads serving Portland now, and in the future.

EXHIBIT 23.

STATEMENT OF MILTON A. MOWAT.

My name is Milton A. Mowat. I am employed by the Commission of Public Docks located at 3070 N. W. Front Avenue, Portland, Oregon, 97210, in the capacity of Deputy Sales and Traffic Manager, a position I have held for the past two and one-half years. Prior to that I was employed as the Traffic Manager of the Port of Tacoma and Tacoma Chamber of Commerce for three years and Blake, Moffit & Towne in Portland for ten years, seven as Traffic Manager and three as Assistant Traffic Manager. I have been admitted to practice before the Interstate Commerce Commission and the Federal Maritime Commission.

The Dock Commission's Chief Engineer, Colonel Alfred M. Eschbach, will describe the facilities of the Commission at Portland. Terminal 4 is located in the general Rivergate area. As Deputy Sales and Traffic Manager, I have studied Terminal 4 and Rivergate, as well as other parts of Portland, with respect to rail service. Movements to Rivergate, we believe, will be heavily rail oriented. The importance of the total cost of shipping by railroad, the freight rate plus switching charges if applicable, will bear very close scrutiny by any industry seeking to locate in this or other industrial area in Portland or the Pacific Northwest. The presence of added or additional transportation costs applying at Rivergate but not at competing sites could preclude its consideration in the selection of a site. These charges could exist and be a deterrent to the natural growth of the Rivergate Industrial District if all of the line haul railroads serving Portland are not granted authority to jointly purchase the Peninsula Terminal Company.

On June 20, 1967, a conference was held in Portland at the request of Governor McCall of Oregon and Mayor Schrunk of Portland. It was attended by the Governor, the Presidents of the Great Northern, Milwaukee, Northern Pacific, Southern Pacific and Union Pacific railroads, the Vice-President of the Spokane Portland & Seattle Railway and representatives of the City of Portland, of the Port of Portland, and of the Commission of Public Docks. The principal subject discussed was the practice of the Portland railroads to assess non-competitive switching charges on certain rail movements originating or destined to Port of Portland or Commission of Public Docks facilities including Rivergate. (See Exhibit No. 23A.) Responding to the questions raised at this conference, the railroad presidents in their telegram of November 1, 1967 to Governor McCall announced the following (See Exhibit No. 23B):

> "Referring to meeting which we attended in Portland on June 20 at which time the Port of Portland and Commission of Public Docks asked the rail carriers to make certain provisions which it was felt would aid in the development of industrial areas. Our railroads have agreed to a single basis of switching charges at all common points in North Pacific Coast Territory which will include the ports within that area. This single basis of switching charges will be absorbed on all carload traffic with two exceptions. The first exception is that a minimum line-haul revenue of $100 per car after absorption will be maintained. The second exception is that switching charges will not absorbed in instances where tariff rate items specifically exclude such absorptions. The latter exception reserves to carriers the right to publish low rates to meet competition and which may not provide

sufficient revenue from which to absorb connecting line switching charges. It is felt these arrangements will permit the development of the port property at Portland as well as at other competitive points in the Pacific Northwest."

It is our understanding that any railroad serving Portland which does not own an interest in the Peninsula Terminal Company would by the terms of Exeception No. 1 in the above telegram from the railroad presidents, be required to assess a switching charge if the carload revenue was less than $100.00 after the absorption of this switching charge. This would not be true of the railroads that own an interest in the Peninsula Terminal Company as they would be governed by the provisions in their respective tariffs which provide for the assessment of switching charges if the carload revenue is less than $40.00 after absorption of the switching charge. (The minimum carload revenue is $67.00 in the case of the Southern Pacific Company.) We understand that the minimum carload revenue of $40.00 per car mentioned above will be increased to $60.00 effective on or about April 1, 1968.

Industries locating in Rivergate will likely ship their products to or from points within a radius of 50 to 100 miles of Portland as well as throughout the Pacific Northwest, the Pacific Coast, and possibly beyond. However, in many cases the carload revenue on shipments within a 50 to 100 mile radius of Portland is less than the $100.00 minimum carload revenue required of non-owners of the Peninsula Terminal Company for the absorption of these switching charges. (See Exhibits No. 23 C and D.) The assessment of switching charges in these cases could work a serious hardship on industries located in Rivergate to the point of either denying them the benefits of rail transportation or increasing their total transportation cost and

making it difficult for them to compete effectively. This situation would not be present if all the line-haul railroads serving Portland owned an interest in the Peninsula Terminal Company.

The Commission of Public Docks supports the position of the Port of Portland favoring joint ownership and operation of the Peninsula Terminal Company and direct access to Rivergate by all of the line-haul railroads serving Portland. This joint ownership and operation and direct access would be a most important step in developing economic rail service for Rivergate and Portland.

EXHIBIT 23A.

Witness: M. A. MOWAT.

Railroad Conference, Portland, Oregon, June 20, 1967

MILTON A. MOWAT, Deputy Manager, Sales & Traffic—Commission of Public Docks

Let us re-orient ourselves as to the locations of The Port of Portland and Commission of Public Docks facilities.

The Port of Portland's Rivergate Industrial District

The Commission of Public Docks Terminal No. 4, and the Terminal No. 4 Extension

The Port of Portland's Swan Island Industrial Park

The Commission of Public Docks Albina Docks, Terminal No. 1, Terminal No. 2

The Portland area is served by the following major rail yards:

The Vancouver Yard of the S. P. & S.

The Albina Yard of the Union Pacific

The Brooklyn Yard of the Southern Pacific

The Lake Yard of the Portland Terminal Railway

In addition to these major railroad yards there are other railroad yards which facilitate the handling of rail cars.

The Barnes Yard of the Union Pacific

The East Portland Yard served by the S. P. & S. Southern Pacific and Union Pacific

The Portland Traction Co. Yard

(The Portland Traction Co. is jointly owned by the S. P. and U. P.)

The Depot Yard of the Portland Terminal Railway

The Hoyt Street Yard of the S. P. & S.

As you can see Portland is ringed with major or secondary railroad yards to serve its seaport, distribution and industrial needs.

The physical switching within the Port's Rivergate Industrial District, the Commission's Terminal No. 4, the Terminal No. 4 Extension, the Port's Swan Island Industrial Park and the Commission's Albina Docks, all located on the east side of the Willamette River, is performed by the Union Pacific Railroad. Switching at the Commission's Terminals No. 1 and 2, located on the west side of the Willamette River, is performed by the Portland Terminal railway, headed by Mr. Jones, which is owned jointly by the Northern Pacific, Southern Pacific and Union Pacific railroads. I would like to mention that although the Portland Terminal Railway is owned jointly by three separate railroads, the Northern Pacific, Southern Pacific and Union Pacific, and this in itself could theoretically create certain inherent problems, their performance of switching to and from the Commission's Terminals 1 and 2 has been consistently excellent. The Union Pacific Railroad, who perform the switching at Terminal No. 4 have also done a yeoman job, often going far out of their way to help us when the need arose.

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EXHIBIT 24.

STATEMENT OF T. E. ROCHFORD.

My name is T. E. Rochford. I have been employed by United Stockyards Corporation for over 29 years. I am presently Division President of Portland Union Stockyards which is a division of United Stockyards Corporation. I am also president of Peninsula Terminal Company, a wholly owned subsidiary of United Stockyards Corporation. I reside in Lake Oswego, Oregon, and my office address is Portland Union Stockyards, North Portland, Oregon 97043.

United Stockyards Corporation became owner of Peninsula Terminal Company in the following manner: For many years, Swift and Company and certain of its subsidiaries and affiliates owned substantial investments in the capital stocks of companies engaged in the stockyards business. One of these so owned was the Portland Union Stockyards Company which, in turn, owned all of the issued and outstanding shares of capital stock of the Peninsula Terminal Company.

In 1920, the Attorney General of the United States instituted proceedings against certain major meat packing companies including Swift and Company, seeking injunctive relief under the Sherman Act and the Clayton Act. Eventually, that action was concluded by the entry of a Consent Decree which prohibited, among other things, the defendants from acquiring or continuing to own, stock of public stockyards and terminal rail carriers. As a result, in 1936 the sale of the stock interest of the meat packers involved the Portland Union Stockyards Company stock going to United Stockyards Corporation. Among the assets of the Portland Union Stockyards Company was the ownership of all issued and outstanding capital stock

of the Peninsula Terminal Company. United acquired the stock of Peninsula by merging with Portland Union Stockyards Corporation in 1963. United now operates in Portland as a division under the name of Portland Union Stockyards.

The acquisition of control of the Peninsula Terminal Company by United Stockyards Corporation was approved by the interstate Commerce Commission in the proceeding entitled "Stockyards Railway Company, *et al.* Control" decided March 9, 1943, Finance Docket No. 13610, 254 ICC 207.

At that time, it must be remembered, stockyards operations required adequate rail switching facilities connecting with line-haul carriers as well as facilities for unloading and loading of animals received by rail or forwarded by rail from the stockyards. Generally, stockyards companies found it necessary to provide or arrange for their own facilities and service because the existing trunk line carriers did not provide them. Since the rail switching services provided by the Peninsula Terminal Company provided the only means of access by rail to the facilities of the Portland Union Stockyards by the line-haul carriers, it was considered, in 1936, a necessary adjunct of the operation of public stockyards. This was true, not only of Portland, but of many other livestock markets.

United Stockyards was interested in 1936 on owning or controlling the Peninsula Terminal Company solely to serve the business of our public stockyards. We were not then, nor are we now, interested in railroad operations except as these occur as necessary appendages to the main stockyard operations. Since our business interest does not extend to operating railroads, we would not be interested in extending the facilities and services of Penin-

sula Terminal Company in North Portland in view of the probable major investment required. Our interests are concerned primarily in the field of real estate and operating stockyards.

It is our desire, if possible, to sell at a reasonable price the shares of capital stock of the Peninsula Terminal Company which we own and which are all of the authorized issued and outstanding shares. Frankly, it is our desire to confine our activities to the businesses we are more familiar with, namely those of operating stockyards and public livestock markets and to real estate. Our roganization is not equipped to follow railroad operations efficiently. We feel that due to our comparatively small investment in railroad properties, it would not pay us to develop an organization for this purpose. In fact, it may be noted that this is not a new thought, but has existed practically from the date of acquisition. We have consistently stated that we do not desire to engage in transportation by railroad in any form, and do not desire to be classed as a railroad.

United Stockyards therefore is interested in selling Peninsula Terminal. The roadbed owned in fee consists of some 15.550 lineal feet of main track, spurs and siding, described in Sheet 3 of Exhibit 14 to the Application. All ties are treated and relaid in sand. No rock ballast is used. The distance from one end of the main line to the other is slightly less than 8,000 feet and change in elevation from one end of the line to the other is about five feet, the west being lower than the east end and most of the change in elevation being on the west end.

Peninsula owns two diesel locomotives, one a 50-ton General Electric Diesel Electric, and the other a 70-ton Cooper-Bessemer Diesel Electric and parts and tools used

in the operation thereof. Peninsula also owns tools for track maintenance and a speeder with car attached for use of workmen. In addition to this equipment, Peninsula owns an engine house large enough for storage of both diesel locomotives at the same time when not in operation and has a parts supply room and mechanical repair room with heat. Peninsula has its own yard office which is approximately 14′ x 23′ 6″ and contains lockers for workmen and train crews. Also, a sand house about 11′ x 18′ is maintained for the drying and storage of sand for use in the locomotives.

Peninsula operates two engine shifts per day, one starting 9 A. M. to 5 P. M. and one starting 9 P. M. to 5 A. M., seven days per week. Light repairs to equipment and roadbed are performed by regular Peninsula employees while heavy maintenance and repairs are accomplished with extra part-time employees on its crews. Prior to January 1, 1968, loading and unloading of livestock was handled by agreement with the Portland Union Stockyards to furnish the men with Peninsula paying the men by the hour for the actual time necessary to do the work. After January 1, 1968, Peninsula will furnish this service by agreement with Portland Livestock Market, Inc. which is the present lessee and operator of the stockyards.

Peninsula has a basic labor agreement dated April 14, 1943, with the Brotherhood of Railroad Trainmen and a basic agreement dated June 15, 1941, with the Brotherhood of Locomotive Firemen and Enginemen. These contracts have been modified from time to time by mutual agreement of the parties.

At the present time, Peninsula pays engineers $29.05 per day with one engineer receiving a rate of $32.68 per day for servicing locomotives, exclusive of mechanical re-

pairs and maintenance. Travelers Health and Welfare Insurance is paid, vacation allowances are the same as those given by the connecting trunk lines, and no holiday pay is awarded. Switchmen are paid $37.88 per day with the footboard yard master receiving $30.21. Seven holidays are paid and if a holiday is worked, an extra day's wage is paid. Travelers Health and Welfare Insurance is provided to switchmen and their vacation allowances are the same as those of the connecting trunk lines.

Management and office personnel of Peninsula consists of four: a President, T. E. Rochford; Vice President, R. W. Hunt; Secretary-Treasurer, C. N. Curtis; and Assistant Secretary-Treasurer, C. A. Fountain. R. W. Hunt is located in Chicago while the rest of the officers are in the office at North Portland. They handle all of the accounting, labor matters, office work such as demurrage and interchanging reports, and general claims or other matters. All are joint employees with United Stockyards Corporation which bills Peninsula for time spent on its work. Insurance matters are handled by the United Stockyards Corporation office in Chicago.

The Peninsula Terminal Company receives cars from main line roads for delivery to industries and delivers cars from industries to the main lines. Four tracks have been provided for this service and are owned either by trunk lines or by trunk lines and Peninsula jointly. Peninsula engines and crews pick up and set out loads and empties when requested during the time engine crews are on duty. The joint agent for the main lines generally informs Peninsula of the service desired after receiving information on inbound or outbound movements. The joint agent for the main lines also makes the inbound interchange report whereas Peninsula makes the outbound interchange report. Peninsula connects with Union Pacific, S. P. & S.,

Northern Pacific Railway Company and the Great Northern Railway. Southern Pacific movements are through one or the other of those four lines.

Exhibit TER 1 is a statement of cars handled by Peninsula for the years 1960 through 1967 with commodity descriptions of numbers handled. This statement is taken from records kept in the normal course of business by Peninsula under my direction and control and the statement is true and correct. In 1967, for example, 34% of cars handled transported wood products, 33% chemicals, 8% livestock, 7% packing house products, 13% paper products, and others 5%.

In 1960, by comparison, of cars handled, approximately 16% transported wood products, 8% chemicals, 48% livestock, 15% packing house products, 6% paper products and others 7%. These figures show that livestock and packing house products shipments have decreased markedly while wood products shipments have increased in the last few years. The total volume of business handled by Peninsula during the years 1960-1967 was at its lowest in 1967 and has shown some improvement since that year. The decline in shipment of livestock and packing house products is due largely to the closing in of the Swift packing operations in North Portland and the change of the status of Portland Union Stockyards from that of a business engaged in the acquisition of livestock for slaughter at North Portland to a public auction yard.

The total termination of operations at the Swift plant in North Portland can be expected to further reduce the volume of business handled during the next few years. Presently, only agricultural chemicals and hides and wool processing are handled for Swift, and the existing facilities in North Portland are likely to be moved to other areas.

Livestock shipments will undoubtedly continue to decrease in volume because of the trend established by packers and truckers in the handling of livestock and the revision of the stockyards method of handling as noted above. The wood products industry on Peninsula, including paper, containers and corrugated products, will likely increase shipments because of the predominant position taken by Crown Zellerbach in that area.

Peninsula is paid by connecting lines for all shipments moving to and from Peninsula. Divisions for Peninsula's services are established by Joint Division Sheet 8-R in connection with traffic handled via Great Northern, Northern Pacific, S. P. & S., Union Pacific and connections. All charges are absorbed by the connecting carriers and no charge is made by them to the industry. Intraterminal and intraplant charge is $22.44 and is assessed by Peninsula to the industry.

Intraterminal, intraplant and livestock handling charges are assessed according to Peninsula Terminal Company Local Switching Tariff No. 23, P.U.C. Ore. No. 32. ICC No. 32. Exhibit TER 2 is a copy of this tariff. Approximately 1% of the total Peninsula revenue is derived from such charges. Demurrage is regulated and assessed under Tariff 4-G (ICC No. H-17) issued by H. R. Hinsch, Agent. Peninsula Terminal Company is a party to Trans-Continental Territory Lines Tariff, C. B. Guthrie Tariff Bureau, Inc., Agent.

Peninsula owns no land which could be considered available for industry development. Peninsula does not have a traffic solicitor and does not attempt to trace cars after they have left Peninsula or before they arrive. However, demurrage is handled in Peninsula's office and revenue accrues directly to Peninsula and it is responsible to

the car owners for per diem. Since switching revenue is based on a division agreement with the main lines, Peninsula does not quote rates nor is it familiar with routing. Peninsula does have a team track and does solicit business from small shippers. Since shipments on Peninsula move from a joint railway operation, Peninsula is neutral where choice of main line movement is involved.

I am familiar with the basis of sale and the price to be paid by the Trunk Lines for the stock of the Peninsula Terminal Company as set forth in Exhibit 7 to the Application, which is the Contract to Purchase.

In order to arrive at a value for the stock, the value of the various assets of the Peninsula Terminal Company was established primarily by appraisal of the American Appraisal Company in November 1962, as set forth in Exhibit 14 to the Application.

Major assets of the Terminal Company consist of land and roadway. The American Appraisal stated that the land was valued as if vacant, with consideration to prevailing prices in the vicinity for industrial tracts. Consideration was also given to sales within the last two years of abutting vacant unimproved land between the right of way and North Portland Harbor, and to current costs of filling the land. Sales of more remotely situated industrial land were also considered, as were estimates of the value of land in the North Portland Harbor Industrial District after fill and development. Finally, the relative elevation and dike protection of the subject land of the Peninsula Terminal Company was considered.

Having arrived at an overall valuation for the land of Peninsula Terminal Company, the American Appraisal Company then determined the cost of reproduction of the roadways, structures and equipment, except for rolling stock, and in arriving at an estimate of such cost of reproduction, consideration was given to local prices for labor

and materials, with provision for contractors' overhead and profit. An estimate was then made by the American Appraisal Company of observed depreciation of such roadways, structures and equipment, and a net value was arrived at, which, together with the land value, represents the valuation established for the bulk of the Peninsula Terminal Company's assets, and bulk of the purchase price to be paid for the company's stock.

During the intervening time between the appraisal and acceptance of the proposal and purchase price by the Trunk Lines, no adjustment was made in the valuations of land and roadway. The total valuation of assets to bring the purchase price for the stock down to date of February 28, 1967, as included in the Contracted for Purchase, was adjusted only to reflect the changes in rolling stock, working capital and miscellaneous additions and betterments which occurred during such intervening period, with the amounts involved based primarily on book values as included in the Peninsula Terminal Company's books and records. The agreement for the purchase and sale of the stock of Peninsula was reached through arm's length negotiations. In my opinion the price for such stock is fair and reasonable to both seller and buyers.

As provided in the Contract for Purchase, the seller, United Stockyards Corporation, has agreed to manage the operation of the Peninsula Terminal Company in accordance with the policies, conditions and standards established from time to time by the Peninsula's Board of Directors. Included in such management services would be supervisory, accounting, stenographic and other necessary managerial services as now provided by United Stockyards Corporation. Included in the management services would be office space, office supplies and personnel to accomplish the foregoing.

I am also familiar with the Balance Sheet and Income Statements of Peninsula which are included as Exhibits 8-B and 9-B of the application. These exhibits are based on records kept in the normal course of business according to prescribed rules and regulations of the Interstate Commerce Commission. They are true and correct to the best of my knowledge.

EXHIBIT TER-1.

PENINSULA TERMINAL COMPANY
North Portland, Oregon

FREIGHT COMMODITIES HANDLED
by calendar years 1960 through 1967

Commodity	Cars Handled							
	1967	1966	1965	1964	1963	1962	1961	1960
Wood Products	943	1,629	824	598	192	404	616	793
Oil	39	58	86	46	8	–	–	–
Chemicals	902	816	690	621	511	417	455	402
Aggregate	31	14	36	66	72	93	73	107
Packinghouse Products	200	336	419	485	565	519	616	725
Paper Products	346	245	268	279	348	334	330	307
Steel	18	62	108	119	81	117	43	140
Livestock	225	417	708	1,005	1,120	1,194	1,660	2,410
Miscellaneous	44	63	77	52	88	50	117	109
Totals	2,748	3,640	3,216	3,172	2,885	3,128	3,910	4,993

EXHIBIT 25

STATEMENT OF W. A. KAVET

My name is W. A. Kavet and I am employed as the Joint Local Freight Agent of the SP&S-Northern Pacific-Great Northern and Union Pacific Railroads at the North Portland Freight Station in North Portland, Oregon.

The North Portland Freight Station is responsible for signing of bills of lading on outbound shipments as well as preparation of necessary documents for both outbound and inbound shipments for industries located on Peninsula Terminal Company tracks at North Portland, Oregon. This is done for the trunk line carriers for whom I work. These trunk line carriers take billing to account and collect line-haul charges on shipments handled via Peninsula Terminal. Peninsula, in turn, receives a division of the revenue for the terminal switching service it performs.

The Freight Station is operated by the Union Pacific and the SP&S alternately every two years, the Union Pacific in 1967 and 1968, the SP&S to follow in 1969 and 1970, All joint expenses are probated against the four line-haul carriers by car count, loads and empties, with the operating road (UP or SP&S preparing a joint facility invoice). This method of operation and responsibility for payment of expenses has existed since 1912 basically the same working relationship as now exists between this joint agency and Peninsula Terminal employees.

The Freight Station is located in Room 200 of the Livestock Exchange Building on North Marine Drive, renting office space from the Portland Union Stockyards. The office is open 7 days a week from 8:00 A. M. to 4:30 P. M. Peninsula Terminal's main office is in the same building, just down the hall.

This freight station handles the billing of out-bound shipments indicating the same on a "pull list" for the Peninsula Terminal. The freight station also handles interchange and switching statements from and to the Peninsula Terminal. Some waybills are revised (rated) and freight bills are prepared for a few non-credit customers but for the most part accounting is performed by a zone accounting office of a trunk line. In addition, this freight station also prepares various reports for the operating, car accounting and freight accounting departments of the various railroads.

Each car destined for North Portland is interchanged UP or SP&S, GN and NP to the Peninsula Terminal while forwarded cars are interchanged Peninsula Terminal to UP or SP&S, GN and NP. This is done daily with interchange reports going to the UP and SP&S car acounting offices. A forwarded and received switching report is prepared daily with a recap made for the Peninsula Terminal four times each month. A switching statement is made for each of the four roads and the Peninsula Terminal prepares an invoice against each road for both received and forwarded switching. In addition, on any shipment received or forwarded via the South Pacific, Peninsula Terminal prepares a switching statement and invoice for SP payment direct.

Each month the SP&S and UP Car Accounts Office prepares a Per Diem Statement for the Peninsula Terminal. This bills the Peninsula Terminal per diem for each day in excess of an arbitrary 5 days. The Peninsula Terminal will then reclaim for each day in excess of the five they do not deem chargeable, such as, for example, cars held for line clearance, claims for empty equipment arriving prior to ordered date, etc.

As a joint station, this office cannot recommend routings to shippers. All of the shippers on the Peninsula Terminal understand that we will not take a car order that is open, that a specific route must be given. For that reason, as well as car service orders, we do not keep any equipment available for prospective loading but order cars from the Car Distributors of the various roads. Each shipper must anticipate his needs at least 24 hours in advance. This does not preclude the fact that, for an emergency shipment, we will request special handling or furnish a car made empty at one of the other industries.

There are approximately 7600 to 8600 cars interchanged through North Portland each year with about 39 percent being Peninsula Terminal business. The major portion of business handled is between the SP&S-GN-NP and the UP for industries located in Zone 6 of the Portland Switching District. None of this business is through freight or cars being passed. All cars are either consigned to or being billed from an industry in the area.

Because of the interchange taking place between the trunk lines themselves and with Peninsula Terminal, at the North Portland yard, a yard office is maintained in addition to the Freight Station. The Yard Office is located at the east end of the yard and has 4 employees, one clerk on duty each shift 7 days per week, 24 hours per day. The Yard Office and yard tracks are jointly owned and are maintained by SP&S and Union Pacific under terms of a supplement to the 1912 agreement establishing the North Portland Freight Station. The four clerks at the Yard Office are Union Pacific employees while the four clerks at the Freight Station are employed by the SP&S. Any temporary vacancy, under 30 days, is filled by the operating road but permanent vacancies are filled by road to

whom the position is assigned. As it pertains to this case, the function of the Yard Office is to list the inbound train to the Peninsula Terminal on a copy of the delivery list which gives Peninsula Terminal Switch Foreman disposition of the cars. The yard also receives car orders from the industries, telephones the car order to road concerned (either UP, SP&S, GN and NP) and, on arrival of empty equipment, gives the Peninsula Terminal copy of car order for car disposition. This is also used by the Peninsula Terminal for demurrage purposes. If necessary, and the freight office is closed, the Yard Office will prepare outbound billing. The Yard Office is also responsible for handling reports on cars interchanged between the trunk line at North Portland.

I have a great deal of contact with the shippers in North Portland and believe that because of the excellent working relationship between Peninsula and the applicants that acquisition of Peninsula by Union Pacific and SP&S would best serve the needs of the area for rail transportation.

EXHIBIT 26

STATEMENT OF N. S. WESTERGARD

My name is N. S. Westergard, and I am vice president and general manager of the S. P. & S. Railway Company. My headquarters and place of residence is Portland, Oregon. I am here on behalf of the applicants, Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company, in support of their joint application to acquire control of the Peninsula Terminal Company through the ownership of its outstanding stock.

The Peninsula Terminal's properties comprise 13.17 acres of land, and 3.79 miles of main and secondary tracks. Included in the latter are 0.8 miles of trackage in which they share a one-half ownership jointly with the applicant companies and Northern Pacific Railway. This jointly owned track consists of two tracks of the 4-track yard known as the North Portland interchange. This interchange yard is now used and has been for many years by S. P. & S., G. N. and N. P. on the one hand and Union Pacific on the other for interchange of traffic, and also between all four of these lines and Peninsula Terminal as well. These tracks provide a direct physical connection between S. P. & S.-N. P. owned main line and/or Union Pacific owned main line on the one hand with wholly owned trackage of Peninsula Terminal. Portions of this trackage were constructed as early as 1908, and the present layout in general has existed since 1931.

Attached hereto marked Exhibit NSW 1—is a map showing the track layout of both Peninsula Terminal and the North Portland interchange tracks with connecting lines of S. P. & S. and Union Pacific.

By way of background information from our records and other available data, the main line railroad jointly owned by Spokane, Portland & Seattle and Northern Pacific Railway between Vancouver, Washington and Willbridge, Oregon was constructed during the years 1906 through 1908. During this same period there was considerable industrial construction including a stockyard and a meat packing plant in the so-called North Portland industrial district on the south side of Oregon Slough adjacent to the new railroad.

An industrial spur connection to reach this development was built coincident with the main track construction. The following year the Oregon-Washington Railroad & Navigation Co. (now referred to as Union Pacific) built their line from Albina to a connection with the S. P. & S. main line in the same vicinity which was given the name of North Portland Junction. About two years later the OWR&N constructed a bypass connection to reach the industrial lead from their main track without entering onto the S. P. & S. main track.

The two railroads shared jointly in the ownership of this industrial connection, and initiallly each performed their own switching in an overlapping or duplicating service. However, as early as 1915 they had agreed that each company would perform all switching for both during alternating two-year intervals. The same principle was adopted for responsibility of the joint North Portland Freight Station which was established under a formal agreement dated June 1, 1912 and is still followed today.

Peninsula Terminal Co. was organized in 1918, and constructed trackage for the express purpose of furnishing switching service to the stockyards and to industries in the North Portland industrial district. Switching opera-

tions, however, continued to be carried on jointly under lease by the S. P. & S. and the Union Pacific at least until October 18, 1930 when Peninsula was granted I. C. C. approval under Docket No. 8389, without objection from the lessees, to operate as a terminal switching railroad.

With commencement of switching by Peninsula, additional interchange tracks were constructed to form the four track yard referred to above. The S. P. & S. together with the N. P. share an equal ownership with the Union Pacific in all four tracks, and as previously mentioned, divide a half ownership in two of the tracks with Peninsula Terminal Company.

With such an extended close association, it is readily understandable that consideration was given on several occasions to acquisition of Peninsula by one or another of the applicants. One such occurrence came in 1963 when owners of Peninsula indicated to S. P. & S. that they were becoming disinterested in their various railroad holdings and operations and proferred a copy of recent appraisal of the Peninsula properties as a proposed basis of sale.

No affirmative decision was reached during those negotiations, and the subject was dropped for the time. However, it came up for reconsideration again in 1966 when principals of the Peninsula Terminal Company reaffirmed their willingness to sell. The initial negotiations in this instance were again carried on with principals of Peninsula by those of the S. P. & S. only.

When the Union Pacific was informed of this, it promptly requested that it be allowed to participate jointly in ownership of Peninsula's capital stock. The S. P. & S. consented and the two railroads further agreed that upon acquisition, the operation should be continued by Peninsula under alternating periods of owner responsibility,

thus conforming with the established pattern for the North Portland joint agency. The basic understanding was that the acquisition should be through purchase of all of Peninsula's 1,500 shares of outstanding stock at a price based on the February 1963 valuation figure of $291,210, adjusted for betterments and retirements up to date; that it would be a cash transaction, subject to approval of the Interstate Commerce Commission. These and other basic conditions were to be provided in a formal purchase contract submitted by the purchasers.

In conformance with this understanding with the United Stockyards Corporation, a joint purchase contract was executed under date of February 28, 1967. A copy is included as a part of our application and identified as Exhibit #7. This agreement was reached through free negotiations and in my opinion its terms are fair to all parties. The properties which we propose to acquire in this transaction are all of the land, trackage, equipment and facilities of Peninsula and which are listed in the appraisal included as Exhibit #14 of the application, except for the two steam locomotives listed on page 4.

A map identified as Exhibit #6 is included with the application. It shows the trackage of Peninsula Terminal and their relationship to the lines of the applicants. However, the map just presented as Exhibit NSWI- updates and clarifies Exhibit #6 to the application and should be considered in lieu of that exhibit.

A brief outline of the usage made of the jointly owned and operated North Portland interchange track is as follows: Track #1, which is the most southeasterly in the interchange yard, is the Union Pacific receiving track for delivery of cars by Peninsula and S. P. & S. which also include G. N. and N. P. The next, Track #2, is the S. P.

& S. receiving track for cars from Peninsula and Union Pacific. Next, #3, is the open or running track. The last one over, #4, is for receiving by Peninsula from Union Pacific and S. P. & S. for itself and parent companies. This procedure is fully provided for by contract between the parties, which also provides for the apportionment of maintenance expense and is referred to in Exhibit C to Exhibit #7 of our application.

The usual practice is for S. P. & S. to make daily deliveries at 2:30 A. M. and 11:30 A. M. and pick up 9:30 A. M. and 6:00 P. M. Service is thereby available to or from industries located on Peninsula to points on the S. P. & S. system, its parent lines and connecting carriers. Attached hereto is Exhibit NSW 2—showing the S. P. & S. system lines and their connections.

The Union Pacific both delivers and picks up at 6:30 A. M. and 2:30 P. M. The joint U. P.-S. P. & S. freight yard office, whose functions will be described more fully by another witness, furnishes Peninsula a list of cars so delivered including their industry consignment or destination. Likewise, the U. P.-S. P. & S. joint agent receives instructions direct from the industries on outbound shipments or release of empty cars. This information then is also given to Peninsula together with instructions as to the proper trunk receiving track to which they should be delivered.

Peninsula Terminal's principal operation is in the switching of cars between these trunk line interchange tracks and the various industries. To provide this service, they regularly work two switch engine shifts 9:00 A. M. to 5:00 P. M. and 9:00 P. M. to 5:00 A. M., seven days per week. Their charges are billed direct against the line haul carriers on a division sheet basis. In addition, they

issue published tariff rates for loading, unloading and servicing of livestock, and also a rate for intraplant industrial switching.

Throughout our negotiations, and it remains today as stated in the application, it is our intention to continue the corporate identity of Peninsula Terminal and its operation and compensation as a separate carrier with the Peninsula employees. In fact, it will be noted that under Section 10 of the purchase contract, provision is made to even continue the seller's present management arrangement.

It is, of course, logical that certain of the services contemplated therein can be assumed by the appropriate departments of the respective new owners, thus making Peninsula operation more economical. In fact, our joint management plan now under consideration, proposes to designate the responsibility to one or the other of the new owners staffs. This, however, would pertain only to supervision insofar as operations and the regular employees of Peninsula are concerned.

At page 21 of our application, we have stated that applicants have no objection to the Commission's prescribing conditions for the protection of employees on the same basis as set forth in *Chicago & N. W. Ry. Co. Merger,* 261 ICC 672. These conditions provide in effect that during the period of four years from the effective date of an order approving the application of the Union Pacific and S. P. & S. to acquire control of Peninsula, the transaction will not result in employees of Peninsula being in a worse position with respect to their employment except that such protection will not continue for a longer period following the effective date of the order than the period during which the employee was employed by Peninsula prior to such

effective date. Applicants repeat their willingness to accept these conditions in any order issued by the Commission herein.

I think it is apparent from the foregoing, the close working relationship that has existed between the two applicant railroads and Peninsula since its inception. During those years Peninsula has conducted its business fairly and provided its customers with good service. It is essential to these customers and, I believe, in the public interest that the service be continued. It follows then that because the owners of Peninsula desire to sell the properties and get out of the railroad business, established full-time railroad operators are their most logical successors. Certainly because of the close relationship in the past and into the foreseeable future the applicants Union Pacific and S. P. & S. are the most logical to assume it.

The experience and the capability of the applicants to continue the operation at an equal or higher level of service is unquestioned. I state positively here that we fully intend to do this. In this connection, I would also call your attention to the interest and certain responsibility of Northern Pacific and Great Northern in the proposed acquisition. Exhibit #10 to our application is intended to show this relationship. The Northern Pacific and Great Northern share an equal ownership in all the outstanding stock of the Oregon Electric Railway and Oregon Trunk Railway.

In addition to the benefit of experience this represents, it is obvious that with the investment in ownership, the applicants will focus their attention even more to North Portland and that added capital could be made available to protect those interests.

Reference is made in our application to extending the services of Peninsula Terminal Company into the Port of Portland's Rivergate industrial area. In fact, the Crown Zellerbach pole yard, which is located within that area, is presently being served by Peninsula and, of course, service will be continued under acquisition by the applicants. However, the questions of whether, when and how far such operations will extend into that area are problematical at this time.

We realize the existing Peninsula trackage has serious deficiencies due to excessively heavy curvature, impaired clearances and low standard track structure. In my opinion, sooner or later, with industrial growth in Rivergate, extensive expenditures for alternation of Peninsula trackage will be necessary in order to adequately serve the area. In fact, it may prove more feasible, even necessary, to serve it by new track access direct from the S. P. & S. mainline. In such event, Union Pacific and S. P. &. S. have already given the Port written assurance that we would provide joint service similar to that being provided now via another connection into the Southwest part of Rivergate.

The application of Southern Pacific request track user rights over Peninsula as well as inclusion in ownership. Such use of Peninsula trackage would be impractical, in fact impossible in my opinion, with the 1000-1500 H. P. type switch locomotives in common use by Southern Pacific. In addition to the inefficiency and expense, duplicated service can be a handicap rather than an asset to shippers due to disturbing their loading operations.

Both Southern Pacific and Milwaukee have requested user rights over the jointly owned North Portland interchange tracks to connect with Peninsula. I believe such operations would require construction of two additional

interchange tracks similar to those described earlier. Under the existing arrangements for the handling of traffic of Great Northern and Northern Pacific and of the Southern Pacific and Milwaukee as well, all cars of these carriers are now being interchanged between the northern lines and Union Pacific and between all lines and Peninsula through the North Portland interchange yard. The great Northern and Northern Pacific cars are handled via S. P. & S. under a contract arrangement and the Southern Pacific and Milwaukee cars are handled by both S. P. & S. and Union Pacific on through routes and joint rates. Should Southern Pacific and Milwaukee acquire rights over the North Portland interchange trackage, their operation of power units would make separate interchange tracks mandatory for handling of their own traffic. This would be an unwarranted construction of extra track which is duplicative of facilities already handling this business. Milwaukee and Southern Pacific access to the North Portland interchange will not in itself create any new business but merely spread existing traffic among more companies for handling between North Portland and various originations and destinations.

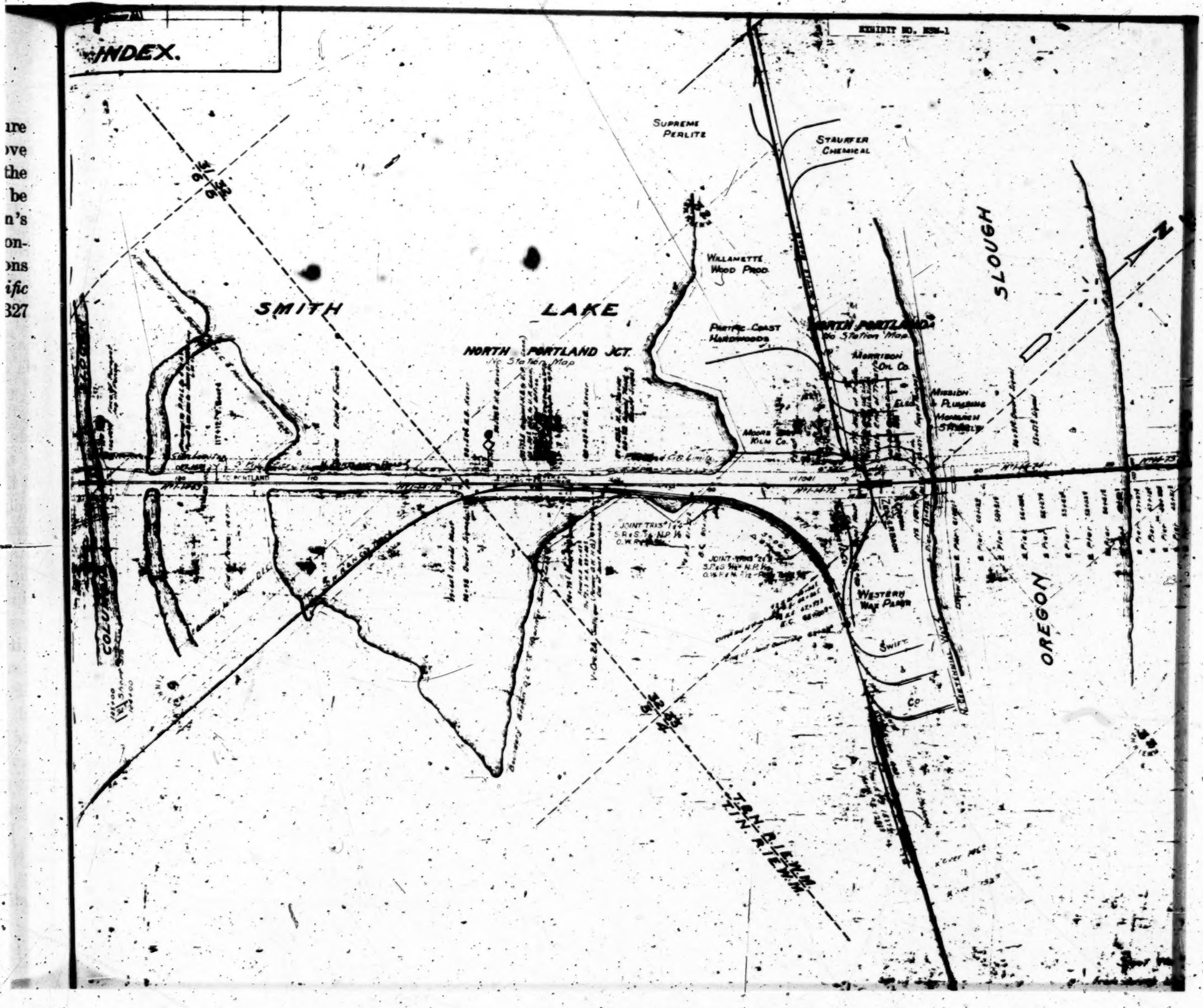
It would be uneconomical and wasteful to furnish more train crews, power units and back-up personnel to handle traffic which is presently handled adequately enough by Southern Pacific and Milwaukee with applicants.

As for the proposed Southern Pacific and Milwaukee inclusion in ownership, Peninsula is a small line with only a few shippers. Its gross revenue is approximately $100,000 a year. Both Milwaukee and Southern Pacific can, and now do share in traffic originating and terminating at Peninsula industries, and their ownership of an interest in this line will in no way benefit the public. For these reasons it is our position that neither the Milwaukee nor the

Southern Pacific should be included as owners of Peninsula or be given trackage rights to reach and/or operate on the property of Peninsula.

In order, however, for the Milwaukee and Southern Pacific to continue in their participation in traffic in and from Peninsula, the applicants are prepared to offer to these carriers the routing conditions which the I. C. C. has considered standard in Sec. 5(2) proceedings, to wit: (1) Upon consummation of the acquisition, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission. (2) The present neutrality of handling traffic inbound and outbound to Peninsula by S. P. & S. and Union Pacific shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through their connections with Union Pacific, S. P. & S. and its parent lines, without discrimination as to routing or movement of traffic and without discrimination in arrangement of schedules or otherwise. (3) The present traffic and operating relationships existing between Peninsula on the one hand and all lines reaching Peninsula through Union Pacific, S. P. & S. or its parent lines on the other, shall be continued insofar as such matters are within the control of Union Pacific, S. P. & S. or its parent lines. (4) Union Pacific, S. P. & S. and its parent lines shall accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination, in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement. (5) Union Pacific, S. P. & S. or its parent lines shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways. (6) Any party or person

having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction of the Commission may be retained to reopen this proceeding on the Commission's own motion for the same purpose. These standard conditions may be found in numerous Commission decisions including *Southern Pacific Company—Merger—Pacific Electric Railway Company, Finance Docket No. 23011*, 327 ICC 38, 40 (1964).


INDEX.
EXHIBIT NO. HSR-1
SUPREME PERLITE
STAUFFER CHEMICAL
WILLAMETTE WOOD PROD.
PACIFIC COAST HARDWOODS
SMITH LAKE
NORTH PORTLAND JCT.
See Station Map
NORTH PORTLAND
See Station Map
SLOUGH
MORRISON OIL CO.
MISSION PLUMBING
MORRISON STREET
MOORE BASIC KILN CO.
WESTERN WAX PAPER
SWIFT
OREGON
COLTON
T.2N. R.1E.W.M.
T.1N. R.1E.W.M.

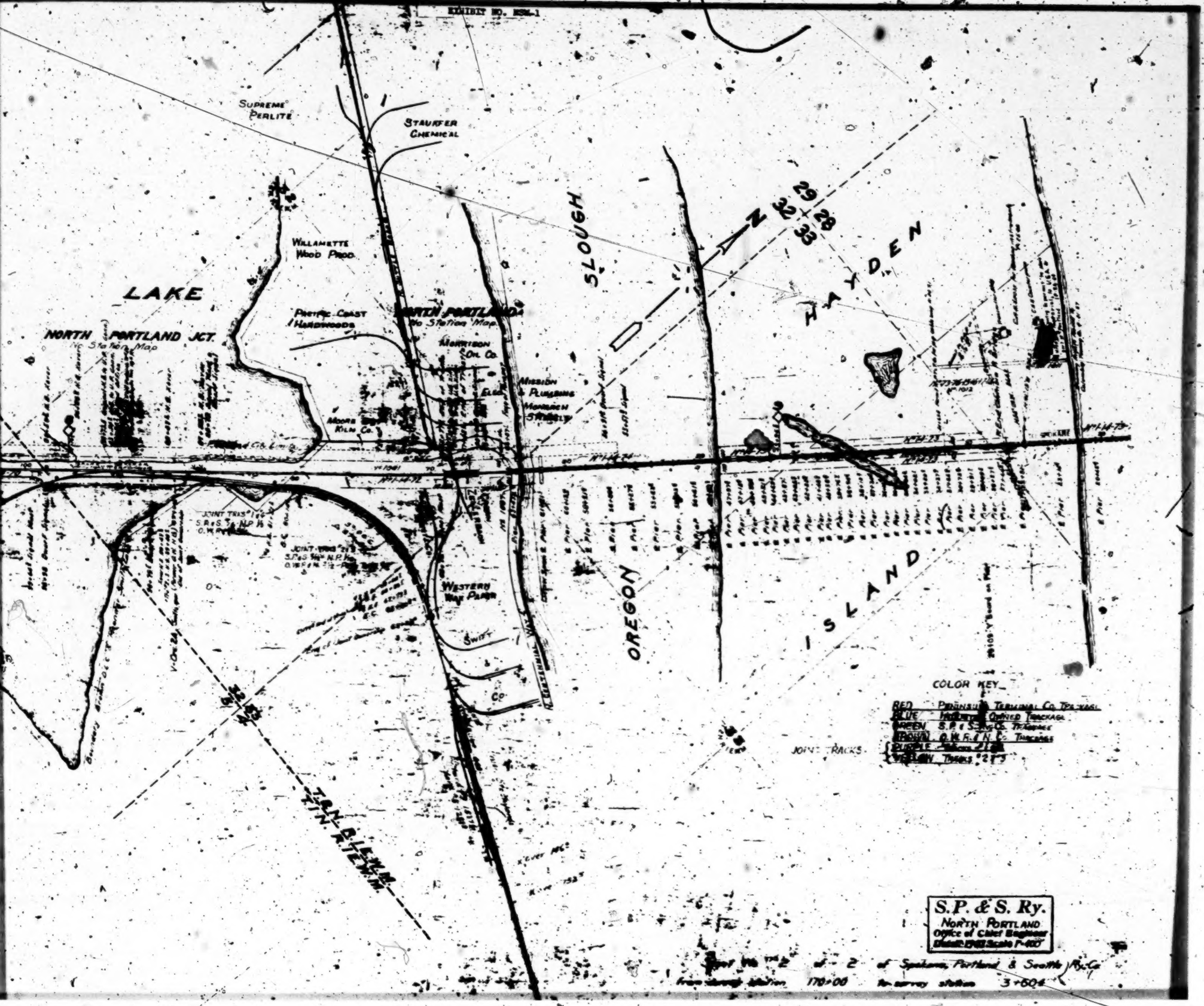

EXHIBIT NO. RSR-1
SUPREME PERLITE
STAUFFER CHEMICAL
WILLAMETTE WOOD PROD.
LAKE
PACIFIC COAST HARDWOODS
NORTH PORTLAND
No Station Map
NORTH PORTLAND JCT.
No Station Map
MORRISON OIL CO.
MISSION & PLUMBING MONARCH O'REILLY
MOORE DRY KILN CO.
SLOUGH
OREGON
HAYDEN
ISLAND
N 29 28 32 33
JOINT TRACKS
WESTERN WAY PLANE
SWIFT
T.2N. R.1E.W.M.
COLOR KEY
RED PENINSULAR TERMINAL CO. TRACKAGE
BLUE PORTLAND GENERAL TRACKAGE
GREEN S.P. & S. RY. CO. TRACKAGE
BROWN O.W.R. & N. CO. TRACKAGE
PURPLE JOINT TRACKS
YELLOW TRACKS #2 & 3
S.P. & S. Ry.
NORTH PORTLAND
Office of Chief Engineer
Drawn 5/1933 Scale 1"=400'
Sheet No. 1 of 2 of Spokane, Portland & Seattle Ry. Co.
from survey station 170+00 to survey station 3+60

EXHIBIT 27.

STATEMENT OF GEORGE H. BAKER.

My name is George H. Baker and I am the General Manager of the Northwestern District of the Union Pacific Railroad Company and am in charge of operational matters of the Union Pacific in the states of Oregon, Washington, Idaho and the extreme portion of Wyoming west of Granger. My headquarters are here in Portland Oregon. I have been employed in various operating department positions for Union Pacific for the past 28 years. Prior to my becoming General Manager in September, 1964, I was General Superintendent of the Eastern District of our company with headquarters in Cheyenne, Wyoming, and prior to that time I was Superintendent of the Oregon Division of our railroad which covers lines in Oregon and Washington and portions of Idaho. In that latter position my headquarters were at the Albina Yard in Portland.

In my various capacities in the Operating Department of Union Pacific Railroad I have worked on and participated in the management of many jointly-owned companies similar to the one involved in our application. I have reviewed the testimony given in this case by Mr. N. S. Westergard, Vice-President and General Manager of SP&S, concerning the facilities involved in this case, and concur in what he has said.

I wish to plainly state the position of my company in support of our joint application with the SP&S and in opposition to the petitions for inclusion and applications for user rights which have been filed by the Milwaukee and Southern Pacific in this proceeding. The granting of the joint application for acquisition by Union Pacific and SP&S of Peninsula Terminal Company will permit the continuation of Peninsula Terminal as a separate switching

company by the trunk line carriers owning trackage in the North Portland interchange yard. It will assure industries in North Portland that railroads now operating the joint freight station and yard office for interchange of their own traffic will extend their responsibility to include the continuation of switching service at North Portland.

Ownership of Peninsula should be limited to Union Pacific and SP&S not only because of their existing adjacent facilities and many years of service in the area but also because of the management problems which could result from a 3 or 4-way ownership. Union Pacific and SP&S have given careful consideration to dividing of management responsibilities between various departments of these companies much in the way we now operate the North Portland freight station with Peninsula remaining as an independent company. If SP and Milwaukee, or either of them, are permitted to share in ownership of 3.79 miles of railroad, I believe its management would become difficult and indecisive and that service to the public could suffer. Our joint ownership of Peninsula Terminal will likewise assure a stable terminal service to industries locating in those parts of the Rivergate Industrial District which are or could be served from existing Peninsula trackage without unnecessary duplication of service, personnel, facilities or equipment.

Under ideal multi-line railroad operations, when switching industries and interchanging traffic, a single carrier is designated as the switching line with as few delivering carriers as possible This way the general public receives the best service and a minimum of disruption to its plant and the railroads involved are put to the least expense. This concept has worked well in North Portland with Peninsula Terminal switching the 14 industries on its line with small power units to fit the sharp track curvatures, rail

weight and maintenance level of the roadbed and a crew consist to fit the special service it renders. Further, the limited number of carriers interchanging with Peninsula and each other at North Portland has kept the size of the yard facility and number of station and yard employees to a minimum. We believe this concept should be maintained by permitting SP&S and Union Pacific to acquire Peninsula Terminal.

My opposition to Southern Pacific's request for rights over Union Pacific and Peninsula Terminal trackage is based on the congestion and economically wasteful operating conditions which granting of this duplication of service would foster. Southern Pacific wants user rights directly through our Albina Yard which we already use to capacity. Operations of SP trains through Albina and especially over our track at the north entrance to Albina is not practical because of the many yard, switch and train movements we already have and the delays we experience because of these heavy movements. SP has access to Peninsula through the tariffs published by the carriers involved in this proceeding. SP service can be continued in this same manner under applicants' control of Peninsula and can be extended to industries served from Peninsula in the Rivergate Industrial District.

The Milwaukee does not now serve Portland. My company opposes their access to Portland, and we also oppose their attempt to obtain trackage rights over the North Portland interchange and an interest in Peninsula Terminal as being contrary to the public interest. With the many years of joint operation in North Portland by SP&S, and Union Pacific, we believe the Milwaukee's interjection would disrupt our present interchange operation and add no benefit to the public. Milwaukee now has access through tariff publications and its additional train movements

into the North Portland interchange, if its requests are granted, will furnish no new public service which is not now or could otherwise be available if Milwaukee is admitted to Portland.

EXHIBIT 28.

STATEMENT OF R. A. LAWRENCE.

My name is Robert A. Lawrence. I am traffic manager of the Spokane, Portland and Seattle Railway Company. I have been employed by the S. P. & S. for 35 years, the last 31 years in the traffic department. I have been traffic manager since August 1962 and have under my jurisdiction the freight and passenger marketing and pricing as well as industrial development. The S. P. & S. is the wholly owned subsidiary of the Northern Pacific and Great Northern Railway Systems. My testimony is in support of the acquisition by stock purchase or the Peninsula Terminal Company jointly by the S. P. & S. and the Union Pacific Railroad, and that we as the new owners be allowed to continue operation of it as a separate corporation.

At the present time the Peninsula Terminal Company serves the Portland Union Stockyards and thirteen other industries located on their trackage at North Portland, Oregon. These industries include a pole-piling operation, paper converting plant for coating wrappings, two industrial-agricultural chemical plants, hide and wool processing, two lumber processing plants, manufacture of dry kilns, conveyors, and wood racks, distribution and packaging of petroleum products, anti-freeze, and tires, manufacture of shingles and woodfeathers, distribution of rock building materials, and processing of light rock aggregate. In addition, there is a limited amount of team track business

The Peninsula Terminal Company maintains no traffic solicitation or service force, and the traffic personnel of the railroads solicit direct from the industries tonnage that may move via their lines. Car tracing, transit, car orders, claim matters, quotation of rates are all normally handled by personnel of the joint Great Northern, Northern Pacific, S. P. & S., and Union Pacific agency. If added assistance is needed on any of these matters, the shippers may call the traffic departments of the lines involved for the needed help. Also, normally, these same shippers deal either directly with the rate bureau involved, or with one of the on-line railroad traffic department's rate personnel for the establishment of any new rates or routes. The Peninsula Terminal Company is in no position to give the shipper these needed services.

Mr. McIntosh of the Union Pacific has expressed clearly the rate policies of the applicants in regard to Peninsula Terminal in the event the commission approved the application, and also our interpretation of agreements reached through the Portland switching study.

Attached hereto marked Exhibit RAL 1- is a copy of the agreement of October 24, 1966 between the Milwaukee Railroad and the Great Northern, Northern Pacific, Chicago, Burlington & Quincy Railroad, S. P. & S., and the new company, The Great Northern Pacific & Burlington Lines, Inc., granting to the Milwaukee certain conditions, effective upon the consummation of the Northern line merger in Finance Docket No. 21478. The S. P. & S. and its parent lines will observe and perform all provisions of this agreement including condition No. 2 which provides for the entry of the Milwaukee into Portland, and the granting to Milwaukee of trackage rights between Longview Junction and Portland.

The Milwaukee now reaches Peninsula Terminal through its connecting carriers and joint rates and routes. Existing rates, routes and channels of trade will not be affected by the proposed acquisition of Peninsula by applicants.

From a traffic as well as an operating standpoint applicants are in complete opposition to Milwaukee's proposed purchase of a one-third interest in Peninsula or access thereto. Peninsula is a small switching line of only 3.79 miles, and management by more than applicants is not required in the public interest.

For the same basic reasons we are also opposed to Southern Pacific ownership of an equal interest in Peninsula Terminal or its acquisition of trackage rights to serve North Portland. Southern Pacific now serves Peninsula industries through its connecting lines, and service through direct access is not required in order to afford the public adequate service.

Exhibit TER 1- presented by Peninsula shows carloads of commodities handled between 1960 and 1967. In further analyzing these figures, I have determined that during 1960 approximately 23% of the livestock receipts in and out of North Portland were via rail, while for 1967 they were approximately 2%. These decreases are due to better highways for truck distribution, lower rates on fresh meats and packing house products via truck and rail as compared to livestock movements, and the availability of both rail and truck mechanical refrigerators. This has caused the relocation of many slaughter houses and meat processing plants nearer the producing areas, and these same economic reasons undoubtedly contributed to Swift & Company's closure in the fall of 1966 of their North Portland slaughtering operations. This also resulted in

the Portland Union Stockyards changing from a commission yard to an auction yard in 1965, and the decision for the United Stockyard Company to lease these facilities to the Portland Livestock Market, Inc., the present auction firm, and thereby make continued ownership of Peninsula Terminal Company less attractive.

Figures on Exhibit TER 1- also show an overall decline in 1967 freight handled when compared to 1966 and prior years. I investigated this and determined that the low 1967 figures on other than livestock was due to the bankruptcy of one shipper in May 1967, decline in the pole and piling market, and the further phasing out of Swift & Company's operations. Our inquiries show a new business located at the site formerly used by the bankrupt firm, the take-over of an existing lumber operation by a more active rail user, and potential increase in carloading from several other existing businesses. From these indications we estimate regardless of further decreases in livestock receipts that approximately 3,000 cars of traffic at this time would be average for Peninsula.

Applicant's lines furnish the line haul for approximately 79% of Peninsula traffic. In 1966, Peninsula handled 3,640 cars in connection with UP-SP&S-GN-NP and their connecting lines. The interchange between Peninsula and applicants was approximately 54% for S. P. & S. and parent lines and 46% Union Pacific. The great preponderance of traffic handled was routed via these lines with Southern Pacific sharing in only 20%, and Milwaukee in just over 1%.

In 1967 Peninsula handled 2,748 cars, with applicants' line haul tonnage being 82% of the traffic, while Southern Pacific routings dropped to 17% of the total and Milwaukee's remained the same.

The Port of Portland's Rivergate Industrial District consists of approximately 2,942 acres of property, and in September 1967 we received a copy of their report summarizing the planning study of the North Portland Peninsula, and the Rivergate Industrial District by their consultants, Daniel, Mann, Johnson, Mendenhall of Los Angeles, California. It took 18 months to prepare this comprehensive general plan of a 14 square mile Peninsula area including a precise master plan of the Port-owned Rivergate Industrial District.

The report recommends a rail system which connects with the S. P. & S. main line. It is possible to serve this area by alternative access routes including an extension of the trackage of Peninsula. Applicants have made no decision on proposals for access to Rivergate and can only state that as the area develops, they will provide adequate switching service into the area without discrimination as to service to the industries or charges to connecting lines.

Other available industrial properties adjacent to the Peninsula Terminal Company's trackage is limited. The West Delta Park area of 624 acres was purchased by the City of Portland during March 1959 through the General Service Administration. This area is located east of the S. P. & S. main line and south of the Peninsula Terminal Company's trackage. The property was purchased for recreational purposes on 50% of the appraised value with the understanding that if any portion of the property was utilized for industrial purposes, the city would have to pay 100% of the appraised value for the portion used, less 5% per year from time of purchase. This property could be served from Peninsula if industries are located on it, however, the city's present plans call for an 18-hole golf course, golf driving range, drag strip, drag boat lagoon, boating and picnic areas, a motorcycle dirt oval

racing track with grandstands, and parking areas, making use of this property for industrial purposes somewhat doubtful.

The Pacific International Livestock Building and grounds is now owned by Multnomah County, and their plans call for the relocation of the Multnomah County Fairgrounds here, with a race track and ample parking area. They have been in cohtact with adjacent property owners, including United Stockyards Company, for the purchase of a site of some 21.69 acres of their remaining property between the Peninsula trackage and West Delta Park. They are also showing an interest in the Peninsula team track area which borders the existing P. I. property on the south.

Swift & Company have phased out of their North Portland property all their operations except hide and wool processing and their agricultural chemical department.

With the desire of the United Stockyards to phase out all of their railroad operations, it appears that the S. P. & S. and Union Pacific are the logical railroads to continue the operation of the Peninsula Terminal Company as a separate corporation. Service is presently rendered at a superior level, and the applicants would be hard pressed to improve it. However, since the primary business of the applicants is the operation of railroads, it is obvious that public interest benefits should follow from their ownership of the Peninsula. With the benefits and knowledge of the applicants' various departments and their equipment, and with more interest in the properties through ownership, we believe we are the parties to continue the fine service of the Peninsula Terminal Company in a manner very similar to existing operations.

EXHIBIT 29.

STATEMENT OF R. W. McINTOSH.

My name is R. W. McIntosh. I am General Freight Agent—Rates & Divisions—Northwestern District, of the Union Pacific Railroad Company, and my business address is 751 Pittock Block, Portland, Oregon 97205.

Union Pacific operates in 13 states including Oregon and physically connects with Peninsula Terminal Co. at North Portland, Oregon. Exhibit (RWM-1) shows the extent of the Union Pacific trackage in this country.

North Portland, Oregon is the interchange junction with the Peninsula Terminal Company and a station on the GN, NP, SP&S and UPRR, within the Portland Switching District. The physical interchange of line-haul traffic moving via the SP&S or its parent companies, GN and NP, or their connecting lines is performed by the SP&S, and the physical interchange of line-haul traffic moving via the UPRR or its connecting lines is performed by the UPRR. Presently, the carriers performing line-haul service in connection with Peninsula traffic compensate the Peninsula Terminal Company according to agreed bases of divisions. The Peninsula Terminal Company's divisions for services performed are established by Joint Division Sheet 8-R in connection with traffic handled via Great Northern, Northern Pacific, SP&S, Union Pacific and connections.

The present Division Sheet 8-R was issued by North Pacific Coast Freight Bureau, Seattle, Washington, effective July 1, 1964. Settlement for these charges is based upon switching statements prepared by the Joint Agent at North Portland. From these statements the Peninsula Terminal Company makes bills for the money due them to

the line-haul carriers who absorb these charges. This also includes bills to the Southern Pacific Company for traffic handled between East Portland interchange and North Portland via the Union Pacific, and between Portland interchange and North Portland via the SP&S, Northern Pacific and Great Northern Railway Companies.

On traffic moving to and from the Southern Pacific Company via the SP&S, Northern Pacific, Great Northern, and Union Pacific from and to industries on the Peninsula Terminal Company at North Portland, Oregon, the Southern Pacific Company absorbs the Peninsula Terminal Company's switching division. Likewise, on traffic in which Milwaukee participates through joint routing, no switching charges are passed on to any industry.

Applicants propose to maintain the present rail rate making policies and permit those line-haul carriers not having a physical interchange with the Peninsula Terminal Company at North Portland, Oregon to reach industries on the latter's line through joint rates or routes to the same extent as such rates and routes exist today.

Rail carriers serving North Portland, Oregon, have established local and joint rates from or to transcontinental territory and west of transcontinental territory and, as future requests for the establishment of rates are received from industries presently located or subsequently locating on the Peninsula Terminal Company, it will be the policy of the applicants in acting upon such requests not to discriminate or show any partiality toward connecting rail lines.

At the request of the Port of Portland and Commission of Public Docks, a Railroad Presidents Conference was held in Portland on June 20, 1967 to give consideration of eliminating non-competitive switching charges to or from

industries located on Port property at Swan Island (Albina) and the Rivergate Industrial area to encourage development of their properties.

The Presidents of the railroads serving the North Pacific Coast Territory, on November 1, 1967, informed all interested parties that an agreement has been reached to establish a single basis of switching charges at all common points within the states of Northern Idaho, Oregon and Washington on carload traffic, and switching charges will be absorbed by the line-haul carriers with two exceptions: The first exception is that a minimum line-haul revenue of $100.00 per car after absorption must be maintained. The second is that switching charges will not be absorbed in instances where tariff rate items specifically exclude such absorptions. The latter exception reserves the carriers the right to publish low rates to meet other competitive modes of transportation.

When the proposed arrangement is implemented, all industries within the Portland Switching District, which includes Port property as well as the area served by the Peninsula Terminal Company and all the other common points in the North Pacific Coast Territory, will be on a competitive relationship and except as in the two instances just noted, all switch charges will be absorbed by the carriers. As it stands now, all Peninsula Terminal switch charges are absorbed by the line-haul carriers.

On behalf of Union Pacific, I wish to state that our position is in complete opposition to the Milwaukee Road acquiring an interest in the Peninsula Terminal Company, also to the Southern Pacific's amended petition in intervention for inclusion to become an equal owner and acquire bridge trackage rights over applicant UP's main line and terminal trackage between Peninsula Terminal Company

and Southern Pacific-Union Pacific track connection at East Portland, Oregon.

Union Pacific also opposes SP's application of similar rights in F. D. Nos. 24890 and 24891. Industries located on the Peninsula Terminal Company have for many years maintained open channels of trade under existing rates and routes. It is our position under the operation proposed for Peninsula that all industries will be adequately served. The Milwaukee Road and Southern Pacific should only be permitted to participate in traffic from or to these industries through present or proposed rate application, which is the recognized rate-making method of all rail carriers not physically serving any respective area.

EXHIBIT NO. RWM-1

ICC Finance D
Exhibit No. (

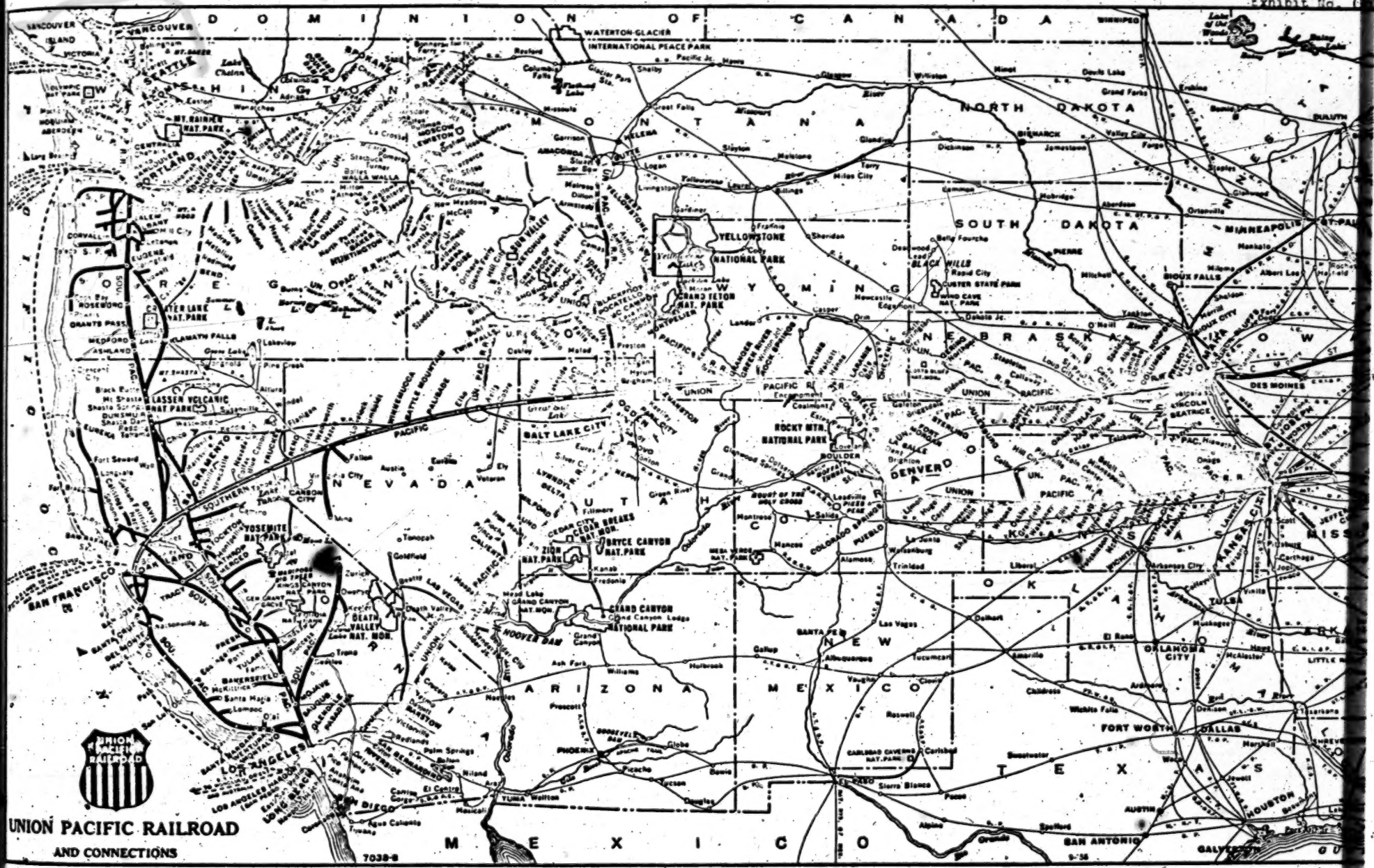


EXHIBIT NO. RWM-1

ICC Finance Docket No. 24679
Exhibit No. [illegible]

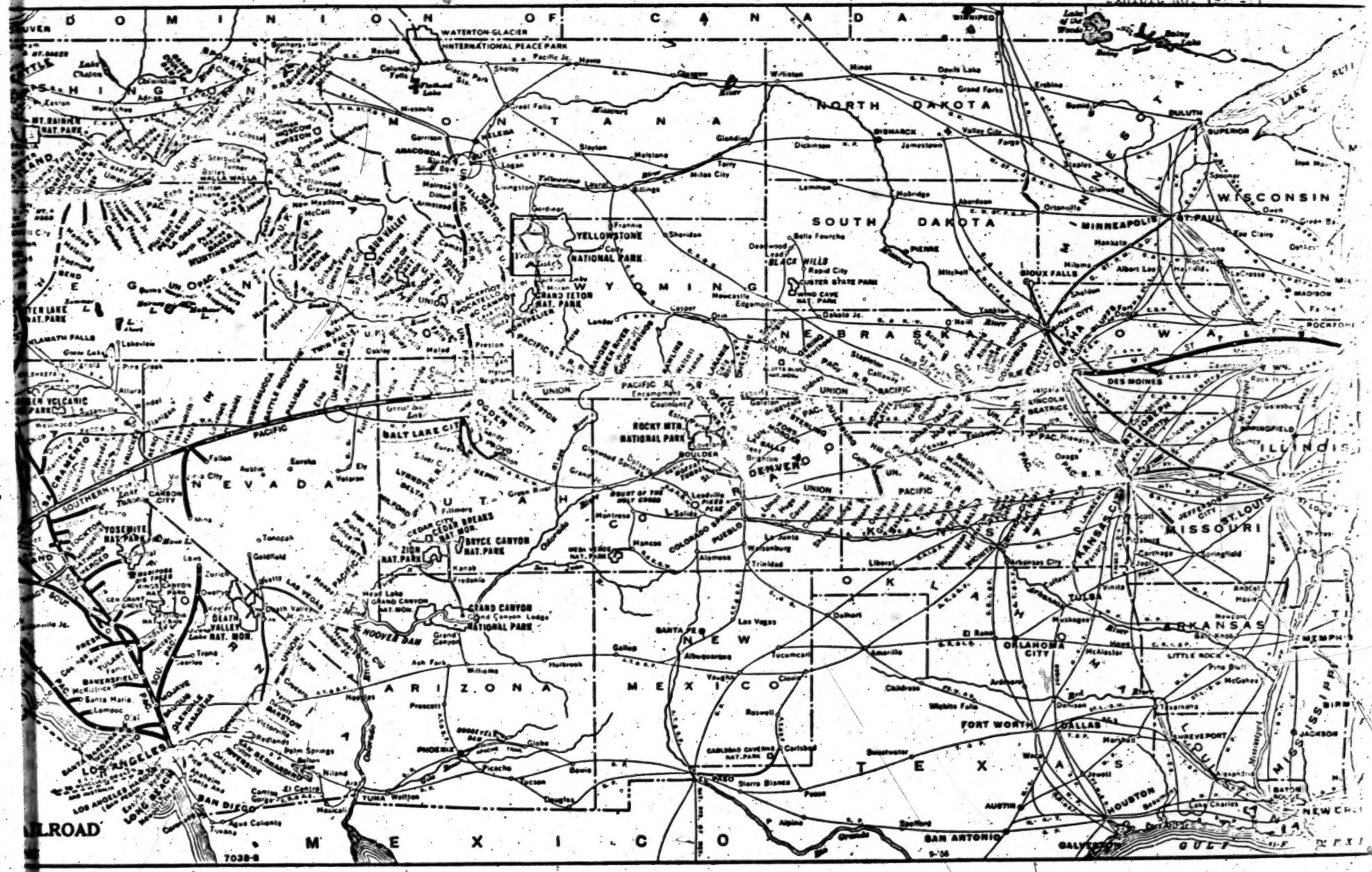


EXHIBIT 31.

STATEMENT OF A. O. BARTELL.

My name is A. O. Bartell, and I am owner of Serendip Industrial Minerals of Portland, Oregon. Our company is located on Peninsula Terminal Company trackage in North Portland, Oregon, and is engaged in the production, processing, jobbing and sales of industrial mineral products. These products include building materials as well as stone used as flux by the electro-metals industry.

In a normal year we will receive approximately 30 cars of stone material, used in building, at our North Portland site for further processing such as crushing and sizing and packaging, or for the direct sale and delivery to job-sites in the area. We will also handle approximately 30 carloads of flux stone moving directly to the plant site of our customers via rail. Flux stone is used for the removal of impurities as part of the refining process of metals.

Nearly all of our supply of rock comes from Canada and the area north of Spokane in the State of Washington. The routings normally are via the northern lines for delivery to Peninsula Terminal as the final carrier in the route. We are therefore dependent upon the SP&S, and its parents, for rail service and the hopper cars used in transporting our supplies.

The office of the joint agent of Union Pacific and SP&S is in North Portland just a block from our plant site. This close relationship has resulted in sympathetic service that has been very helpful to our small but growing company. This relationship would, of course, be strengthened by the acquisition of Peninsula Terminal by the two-trunk lines, Union Pacific and SP&S who also handle our shipments. We feel the fewer the "cooks in the broth" the easier our problems will be.

We are in the process of bidding on the decorative aggregate for the new Georgia-Pacific Building at Portland and estimate that some 15,000 tons of inbound material will be needed if successful in our proposal. This would involve 250 carloads of inbound material, mostly from Meade, Washington to our North Portland site. We believe that our interests would best be served by having the application of SP&S and Union Pacific approved and, therefore, support it.

* * * *

EXHIBIT 32

STATEMENT OF MAYNARD COCHRAN

My name is Maynard Cochran and I am the owner of Willamette Wood Products, Inc., located on the Peninsula Terminal Company in North Portland, Oregon. My company is in the "cut stock" business making stock for baby cribs, casket liners, wooden toys and other similar items. My plant is located on a 2½ acre tract just west of the SP&S Main Line in North Portland, and I am served by Peninsula Terminal Railroad. My company averages one car a week of traffic originating at this location. Of these shipments approximately one-half are inbound from Omak, Washington and move on transit rates with the balance of the inbound raw material traveling via motor carrier.

I sell or supervise the sales of all products manufactured at our plant and have been dealing with many of my customers for a great many years. I have found that the service of Peninsula Terminal is very good. Requests for switching from my plant have been met in as little time as 15 minutes from the time I have called in a request for

switching. I rely on railroad service over routes presently available on the SP&S-NP-GN and UP and any of their connecting routes. I can foresee no need for an expansion of any of these routes, although my business in the future should be increasing from my Peninsula Terminal location as demands from my customers over the years have increased steadily. I support the application of UP and SP&S for the acquisition of Peninsula Terminal Company because I rely on these trunk line carriers for my line haul and believe that their ownership of the switching carrier serving my plant will insure continued good service. I understand that the Peninsula Terminal service will be rendered in the same manner as it is now and believe that because of the broader experience of the applicant lines in the railroad business, the availability of numerous experienced employees and financial strength of these lines as parents of Peninsula Terminal would be beneficial to my position. I strongly urge that the I. C. C. approve the application of these lines.

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EXHIBIT 34

STATEMENT OF RICHARD B. KENNEDY

My name is Richard B. Kennedy and I am Secretary and Sales Manager of Morrison Oil Company. My company is served by Peninsula Terminal in North Portland. At that location I receive tank cars of oil, cans and tires via rail, anti-freeze via water with a transfer move via truck from St. Johns and in outbound shipments handle canned anti-freeze, packaged oils, brake fluids, etc.

My plant in North Portland is for the storing, warehousing and packaging of oils, anti-freeze, brake fluids, tires, etc. On an average I will receive and ship 50 to 55 cars via rail each year. My inbound moves are largely S. P. with a bridge movement via U. P. or SP&S to Peninsula Terminal. On outbound movements I cover the Butte-Billings-Missoula territory by rail. Existing routes and rates are available for all of my business and any expansion which may come in the future. My plant is set up to handle much more business and as the demand presents itself my production will increase to meet it.

My company supports the acquisition of Peninsula Terminal by U. P. and SP&S because it will strengthen the carrier which is responsible for the switching of my goods to these trunk lines. While Peninsula has always performed service extremely well, I understand that the present owner of Peninsula is not committed to continuing this service whereas I believe U. P. and SP&S are since railroading is their stock and trade. I can reach all sources of supply and markets for my products which are available via existing rail routes without penalty. With an ownership in Peninsula, the U. P. and SP&S should help develop new markets by keeping channels of trade open and encouraging growth in their territories. Therefore, I urge that the I. C. C. grant the application of these two trunk lines.

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EXHIBIT 35

UNION PACIFIC RAILROAD COMPANY
and
SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY

Portland, Oregon
January 19, 1960

Mr. Dennis Lindsay, President
Port of Portland Commission
Swan Island
P. O. Box 4099
Portland 8, Oregon

Dear Mr. Lindsay:

Ramsey Lake Development—
Dow Chemical Co.

Following the conference held in the Port Commission office on January 13, representatives of the Union Pacific Railroad Company and of the Spokane, Portland and Seattle Railway Company held further conferences with respect to the problem of rail service to the Ramsey Lake area, which the Port of Portland intends to develop. As a result of these discussions the two railroad companies now submit the following proposal:

(1) For the purpose of this proposal, the "Ramsey Lake area" includes the area lying generally between the Williamette River on the west, the Willamette Meridian on the east, the Columbia River on the north, and on the south the proposed industry lead track hereinafter defined. The "Proposed Down Chemical Plant Site" refers to the area of approximately 100 acres located in the southwesterly corner of the property now owned by the Port of Portland, adjacent to the Bonneville Power Administration

right of way on the south and partially adjacent to the Willamette River on the west.

(2) The proposed industry lead track herein referred to has not been precisely surveyed, but in general will extend from a connection with Union Pacific's Barnes Yard approximately at the crossing of Swift Blvd., thence in a general northwesterly direction to the property of the City of Portland lying northerly of the right of way of the Bonneville Power Administration, thence in a westerly direction lying as closely as practicable to the southerly boundary of said property of the City of Portland, to the east line of the presently-owned property of the Port of Portland.

(3) The following proposal is contingent upon completion of negotiations with Dow Chemical Company, the purchase by that company of the proposed Dow Chemical Plant Site, and the commitment of that company to proceed immediately with the construction of a manufacturing plant located on such property of the general nature heretofore discussed between representatives of that company, the Port of Portland and the above-named railroad companies.

(4) Subject to the conditions stated in this proposal, Union Pacific will construct the proposed industry lead track, and Union Pacific and SP&S have agreed upon a satisfactory basis for sharing the cost thereof. Said track will be jointly owned by Union Pacific and SP&S, except as to the portion for which refund is to be made as provided in paragraph (9), which will be owned by the Port after refund is completed.

(5) Industries to be located on rail trackage on property to be developed by the Port of Portland in the Ramsey Lake area, including the proposed Dow Chemical site, will be served by both Union Pacific and SP&S in a manner

similar to that presently applying at Municipal Terminal No. 4, and will be switched by Union Pacific both for itself and for SP&S, which companies have agreed between themselves upon a satisfactory basis therefor.

(6) The City of Portland and Port of Portland, without charge, will provide necessary right of way for such lead track over property presently owned by the City of Portland, and borrow rights on its or their properties for necessary fill material.

(7) The City of Portland and Port of Portland will cooperate and assist in obtaining necessary right of way for such lead track over property not now owned by either the City, the Port or either of the railroad companies, including an easement or license over the right of way of the Bonneville Power Administration.

(8) The Port of Portland will construct and maintain at its own expense and in a manner satisfactory to Union Pacific, all necessary trackage on its presently-owned property, and on property which it may acquire in the future, and will reserve sufficient rights of way for the extension of trackage to serve the balance of the property to be developed by the Port in the Ramsey Lake area.

(9) The Port of Portland will refund to Union Pacific, for division between Union Pacific and SP&S upon a basis agreed upon between them, the cost of construction of the trackage upon property presently owned by the City of Portland northerly of the right of way of Bonneville Power Administration, such refund, if not made upon completion of construction, to be over a term of years to be agreed upon, with interest at the rate of 6% per annum on the unpaid balance. Union Pacific and SP&S will retain ownership of said portion of the lead track until full refund has been made, but maintenance of said portion shall be at the expense of the Port.

Union Pacific and SP&S will enter into a contract providing details as between themselves that need not concern the Port. However, the foregoing general outline should permit the Port to make a definite response to Dow Chemical Company by its deadline of January 20, 1960.

* * *

EXHIBIT 36.

UNION PACIFIC RAILROAD COMPANY
and
SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY
Portland, Oregon
May 25, 1960

The Port of Portland
Swan Island
P. O. Box 4099
Portland 8, Oregon

Gentlemen:

Ramsey Lake Development

This is in response to Mr. Winn's letter of April 6, 1960, requesting confirmation of the policy and agreement made concerning rail service to the Ramsey Lake Area at the time of the negotiations with Dow Chemical Company, and his letter of May 2, 1960, requesting immediate acquisition of right of way from Barnes Yard to the Bonneville right of way.

On January 19, 1960, these two companies jointly addressed a letter to Mr. Lindsay, President of the Port of Portland Commission, outlining a proposal for rail

service to the area in question. That proposal, of course, related only to the Dow Chemical transaction then under consideration, and which did not materialize.

However, we are authorized to state that if another major industry, which will produce sufficient rail traffic to justify the investment, locates on Port property in the Ramsey Lake area, and if circumstances at that time are not substantially different from those obtaining at the time of the negotiations with Dow Chemical Company, those two railroads will provide rail service and joint rates to and from such industry on the same terms and conditions as set forth in our letter of January 19, 1960. In essence, our letter of January 19, 1960, adopted the same pattern of service for the Ramsey Lake area as exists at Municipal Terminal No. 4. In the event that the location of any such industry could more advantageously be served from SP&S trackage, rather than Union Pacific trackage, then Union Pacific would be granted access on terms corresponding to those by which SP&S would have access to the U. P. trackage referred to in the letter of January 19, 1960.

With respect to immediate acquisition of the proposed right of way from Barnes Yard to the Bonneville Power Administration property, we are now progressing the matter with out respective principals, and we will write to you further as soon as we have definite word.

* * *

EXHIBIT 38.

STATEMENT OF WILLIAM F. KRAUSE.

My name is William F. Krause. I am an Assistant General Traffic Manager of Crown Zellerbach Corporation, and am located at the company's headquarters at One Bush Street, San Francisco. I have held this title since September 1, 1955. My responsibility in this position is for corporate transportation pricing and related areas of activity such as plant locations and relocation studies, commodity classification determinations, and corporate representation before Carrier Bureaus and Regulatory bodies, both State and Federal. From July 12, 1948, and until October 1, 1953, as Assistant Traffic Manager, I had, in addition to the aforementioned responsibilities, the over-all responsibility for transportation operations under the direction of the corporate Traffic Manager.

Crown Zellerbach is the second largest producer of paper and paper articles in the United States. It also produces lumber, plywood and industrial chemicals. The largest concentration of the company's principal paper mills and converting facilities is centered in the greater Portland, Oregon area. The largest single distribution center for our Camas, Washington, Wauna and West Linn Oregon mills is located in the city of Portland, Oregon. This facility ships in excess of 1100 rail carloads per month. Because the company has recently completed the greatest expansion program of its production capabilities ever undertaken, with the general Portland area mills accounting for the largest share of its over-all corporate expansion, it is being forced to consider the expansion of its distribution complex (known as Waterway Terminals Co.), to the Rivergate Industrial area of North Portland. This area is mentioned at page 20 of the Application of Union

Pacific and Spokane, Portland and Seattle as an anticipated source of "future substantial new traffic and revenues".

Crown Zellerbach's facilities presently located on the Peninsula Terminal Company consist of a so-called Pole Yard and the North Portland Plant of its Flexible Packaging Division which is engaged, primarily, in various paper coating operations.

In addition, Crown has contracted to purchase approximately 44-acres of Swift & Company property lying adjacent to the North Portland Flexible Packaging Division property which will be served by the Peninsula Terminal Company.

A 200,000 square foot warehouse will be built, in whole or in part, on this property for use as the distribution facility for the Flexible Packaging Division plant, and also for the storage of inbound raw materials, as needed. Additionally, money has been appropriated for the construction of a plant on the Swift property for the production of printing inks under the jurisdiction of our Gaylord Container Division. The number of railroad cars handled by the Flexible Packaging Division at North Portland consisted of 365 cars for the 12-month period ending November 30, 1967.

For the same period, the Pole Yard made 177 shipments of Poles and Piling manufactured at this North Portland facility. A total of 638 rail cars were required for these shipments. Of this number, 246—65 foot drop-end gondola cars were required. These cars are in short supply.

The Peninsula Terminal Company does not own any freight cars. The Spokane, Portland and Seattle does not own any 65 foot drop-end gondola cars. However, its

parent companies, the Great Northern and Northern Pacific, collectively, own 73. The Union Pacific owns 246—65 foot drop-end gondola cars; the Southern Pacific 404 and The Milwaukee Road 63.

From the foregoing it is evident that Crown Zellerbach has a substantial interest in the railroad service to these areas. Speaking from the experience we have had at the Pole Yard, the present car supply has been less than satisfactory. Of the 177 shipments made during the twelve-months period ending November 30, 1967, 114 or 64% involved delays running from one day to twenty-six days in length. The average of all delays was 4½ days per shipment.

It stands to reason that the more carriers giving single-line service to our plant, the better the opportunity we as a shipper will have to draw upon the reservoir of cars available and thereby minimize delays attributable to this factor.

In addition to minimizing the delay problem, allowing more carriers to serve our facilities in single-line service will result in less switching of cars with less handling of freight and consequently less likelihood of damage, less time in transit and in terminals, and easier tracing of shipments.

Also of extreme importance is the fact that single-line service guarantees a single-line rate and removes the question of whether or not, and to what extent, switching charges will be absorbed by the carriers not directly serving the facility.

It is the position of Crown Zellerbach, that its interest will be best served by joint ownership of Peninsula Terminal Company. It has been our experience that creation

of competitiveness among carriers in serving its facilities is vital to our interest.

Accordingly, Crown Zellerbach urges joint ownership of Peninsula Terminal Company by all four carriers who seek to share in its joint ownership and operation. It further urges that necessary trackage rights be granted to permit Southern Pacific and The Milwaukee Road to reach and make a physical connection with Peninsula Terminal Company whether or not the Commission approves joint ownership.

EXHIBIT 39.

THIS AGREEMENT, made this 26th day of May, 1967, by and between OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, an Oregon corporation, and its lessee UNION PACIFIC RAILROAD COMPANY, a Utah corporation (hereinafter collectively called "Union Company"), party of the first part, and SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Washington corporation (hereinafter called "Portland Company"), party of the second part,

WITNESSETH:

RECITALS:

1. The Port of Portland, a municipal corporation of the State of Oregon, has undertaken development of the so-called River Gate Industrial District, which at the present time lies generally in that area between the Willamette River on the west, the Willamette Meridian on the east, the Columbia River on the north and the Bonneville Power Administration right of way on the south, all in Township 2 North, Range 1 West of Willamette Meridian in Multnomah County, State of Oregon.

2. At the request of the Port, the parties hereto have jointly agreed to furnish rail service to said River Gate Industrial District by means of an industrial lead track to be constructed between Union Company's Barnes Yard and the said River Gate Industrial District. The parties hereto make this agreement for the purpose of stating the terms and conditions upon which they will severally discharge their joint obligation to the Port.

Now Therefore, it is agreed by and between the parties as follows:

ARTICLE I

Section 1. There is attached hereto a map marked "Exhibit A" dated April 18, 1967, which map is by this reference made a part hereof. Said map illustrates in yellow color the track (including runaround track) to be constructed as herein provided by the parties hereto, and in green the track connecting therewith to be constructed by and at the expense of the Port of Portland.

Section 2. The Union Company shall acquire all necessary rights of way for the portion of said track shown yellow on Exhibit A (including runaround track) jointly in the names of the Union Company and the Portland Company. The Portland Company shall cooperate with the Union Company in the acquisition of said rights of way and shall pay one-half the cost thereof, either directly or by reimbursement to Union Company, which reimbursement shall be made promptly on rendition of bill or bills therefor.

Section 3. The Union Company shall construct the track (including runaround track) upon the rights of way acquired as aforesaid. The Portland Company shall reimburse the Union Company for one-half (½) the cost of said construction promptly on rendition of bill or bills

therefor, following which the Portland Company shall be equal joint owner with the Union Company of the track so constructed.

In the event and at such time as this agreement is terminated, Union Company may at its option remove the track material, paying to Portland Company one-half of the value of such salvaged material, after deducting cost of removal; or, if within sixty (60) days of receiving a request from Portland Company to remove such track material Union Company fails to do so, Portland Company may at its option remove the track material, paying to Union Company one-half of the value of such salvaged material, after deducting cost of removal.

Section 4. The Union Company will have the general control, management and administration of said track (including runaround track) and rights of way and will maintain and at all times keep the same in good condition and repair. The Union Company will also maintain the connecting track owned by the Port of Portland to the extent required by agreement between said Port and the parties hereto.

Section 5. Each party shall report to the taxing authorities for purposes of taxation its interests in said track and rights of way including runaround track and pay when due and before delinquent any and all taxes, assessments and governmental charges of whatsoever kind or nature levied upon or against its interest in said properties. Each party at its own expense shall obtain and carry such insurance as it desires upon its interest in said track and right of way.

Section 6. Neither party, without the written consent of the other party, shall with reference to all or any part of said track or rights of way including runaround track admit any nonparty to the use thereof.

ARTICLE II

Section 1. The Portland Company will deliver and receive its cars, loaded or empty, destined to or originating at said River Gate Industrial District, upon interchange tracks designated by Union Company's officers in the Union Company's Barnes Yard. The Union Company will switch the said cars without discrimination or unnecessary delay between said interchange tracks and said River Gate Industrial District.

Section 2. The reference to "cars of the Portland Company" shall include freight cars of the Northern Pacific Railway Company and Great Northern Railway Company, it being the purpose of this agreement to cover and include in the switching service herein arranged for, the cars of the said two companies last named. But it is understood that no loads or empties will be received in Union Company's Barnes Yard unless same be destined for delivery at the River Gate Industrial District or the City of Portland's Municipal Terminal No. 4, nor will the Union Company deliver any cars or loads to the Portland Company, the Northern Pacific Railway Company, or the Great Northern Railway Company in its said Barnes Yard, except such as originate at the River Gate Industrial District or said Municipal Terminal No. 4. Cars will not be placed or delivered by the Portland Company on said interchange tracks for delivery to said River Gate Industrial District or said Municipal Terminal No. 4 unless the industries at the River Gate Industrial District or said Terminal No. 4 are then prepared to accept such cars from the Union Company.

ARTICLE III

Section 1. The Portland Company agrees to furnish such cars as may be necessary for handling its business and the business of the Northern Pacific Railway Company and Great Northern Railway Company originating at the

said River Gate Industrial District. The Union Company will return all such cars received from shippers in the said River Gate Industrial District to the Portland Company on the aforesaid interchange tracks, without discrimination or unnecessary delay.

Section 2. All cars handled under this contract by the Union Company for the Portland Company and Northern Pacific Railway Company and Great Northern Railway Company shall be deemed at all times in the possession of the Portland Company, and such Company shall be solely liable for and shall pay any and all per diem, mileage or similar charges, if any, for the use of such cars, and shall collect for its own account any and all accruing demurrage.

ARTICLE IV

Section 1. The Portland Company for itself and for the Northern Pacific Railway Company and Great Northern Railway Company assumes all risk and damage on account of loss, injury, destruction or delay of cars or contents while same are under the control of the Union Company under this contract, and will indemnify and hold the Union Company harmless from any claim or claims made or prosecuted against the Union Company for any such loss, damage, injury, destruction or delay of said cars or contents while in the control of the Union Company hereunder.

ARTICLE V

Section 1. The Portland Company agrees to pay and the Union Company to accept for the services to be rendered by Union Company under this contract:

(a) A flat charge of Twelve Dollars ($12.00) per car, whether loaded or empty, per movement either to or from said River Gate Industrial District;

(b) A proportion of all expenses incurred by the Union Company in the discharge of its obligation to maintain and repair the track, including the runaround track and the connecting track owned by the Port of Portland, which said proportion bears to the total of said expenses the same ratio which the number of Portland Company's cars (as hereinafter defined) handled hereunder in each calendar month bears to the whole number of cars handled to and from the River Gate Industrial District during the same period; and

(c) A proportion of all expenses incurred by the Union Company by reason of injuries to persons (whether employees of the Union Company or persons other than such employees) or by reason of damage to or destruction of fixed properties of the Union Company employed in the service rendered hereunder, or to its motive power while so employed, or by reason of damage to or destruction of property of third parties, when such injury, damage or destruction is caused by or results from services rendered hereunder, which said proportion bears to the total of said expenses the same ratio which the number of Portland Company's cars (as hereinafter defined) handled hereunder in each calendar month bears to the whole number of cars handled to and from the River Gate Industrial District during the same period.

Definitions: Whenever used in this Article V, the term "car" or "cars" shall not include engines and tenders; and the term "cars of the Portland Company" shall mean and include besides cars of Spokane, Portland and Seattle Railway Company, also cars of Northern Pacific Railway Company and Great Northern Railway Company.

Section 2. It is the intent of the parties that the charges stated in Section 1 of this article shall be the fair and

reasonable cost of the services for which said charges are made. At any time after six (6) months from the date hereof a redetermination and revision of said charges shall be made on the basis of the then actual experience of the Union Company in performing said services, if written notice and demand therefor shall be given by either party to the other. Said redetermined and revised charges shall be effective from and after the first day of the month next following the month in which said notice is given, unless otherwise agreed. If the parties do not redetermine and revise said charges within the six (6) months immediately following the commencement of negotiations for that purpose, or within such further time as may be agreed upon, the matter shall be submitted to arbitration as hereinafter provided.

Section 3. If the volume of business handled for the Portland Company hereunder requires the use of additional trackage in Union Company's Barnes Yard, the Union Company shall either assign such additional trackage to such use, or construct additional trackage to be so used. If such trackage is so assigned, the Portland Company shall pay annually to the Union Company, in addition to the charges specified in Section 1 of this Article, as rental for the use of said trackage an appropriate percentage of the value of such trackage (including roadbed, right of way and other property in place appurtenant thereto), together with all expenses incurred by the Union Company in the maintenance and repair of said trackage, so long as said trackage continues to be assigned to such use. If such trackage is so constructed by Union Company, the cost thereof shall be paid by Portland Company promptly on rendition of bill or bills therefor. The Portland Company shall not thereby acquire any right, title or interest in the trackage so constructed, which shall be owned by

and subject to the unrestricted control, management, direction and administration of the Union Company, but upon termination of this contract howsoever, the Union Company shall pay to the Portland Company the then salvage value of the materials comprising said trackage, less the cost of recovery thereof. The Union Company shall have full and final authority to determine from time to time whether the business handled for the Portland Company hereunder requires assignment or construction of additional trackage as herein provided, but such judgment shall not be arbitrarily exercised.

ARTICLE VI

Section 1. Union Company shall be bound to use only customary care, skill and diligence in maintaining and repairing the property involved in this agreement, and in managing and operating the same, and the indemnity assured by the Portland Company to the Union Company in the switching of the cars and loads of the Portland Company shall obtain and continue irrespective of any question or charge of negligence or inefficiency of the Union Company in its maintenance or its operation.

ARTICLE VII

Section 1. The books, records, vouchers and papers of the Union Company touching or material to the property involved in this agreement and betterments or additions thereto, or touching or material to the cost of rendering services hereunder, at all times shall be freely open to the examination of the Portland Company.

Section 2. If at any time a question shall arise between the parties hereto touching the construction or intent of this contract, or concerning the business or the manner of transacting the business to be carried on under

its provisions, or concerning the observance or performance of any of its covenants or stipulations, upon which the parties cannot agree, such questions shall be submitted to the arbitrament of three disinterested persons familiar with such business and experienced in railway operation, accounting or management. The party demanding such reference shall give to the other party written notice of such demand, stating specifically the question to be submitted for decision and nominating a person who has the required qualifications to act as one referee. If at the expiration of thirty (30) days from the receipt of such notice the party receiving it has not notified the party demanding the reference of its nomination of a second referee having like qualifications, the party making the demand may make such selection. The first and second referees chosen shall select a third, and when the board is complete the referees shall fix a day and place for hearing, of which the parties shall be severally notified. If the referees chosen shall be unable to agree upon a third referee, such third referee may be appointed upon ten (10) days' notice upon motion of either party by a Judge of any Court of the United States within the State of Oregon. After hearing the testimony and arguments which may be submitted by each party, the referees, when a majority of the arbitrators agree upon an award, shall state it in writing, which when delivered to both parties shall be binding and conclusive upon each, and each party hereby expressly agrees to be bound conclusively thereby; and immediately upon such award each party will make such changes in the conduct of its business or such repayment or restitution, as the case may be, as are in and by such award required by it to be made.

The books and papers of both parties, so far as they relate to any matter submitted to arbitration, shall be open

to the examination of the arbitrators, and the party against whom award is made shall pay all the fees and expenses of the arbitration; and until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made under the terms of this agreement shall continue to be transacted and made in the manner and form existing prior to the arising of such question.

If either party shall refuse to keep and perform any award, the adverse party may enforce the same by apt proceedings in any court of law or equity.

ARTICLE VIII

Section 1. The Portland Company covenants and agrees to faithfully perform each and all of the conditions and obligations stated in this contract. If the Portland Company shall fail to make any of the payments required by this contract, within the time provided for such payment, or shall fail to keep or perform any of the covenants, obligations or conditions hereinbefore or hereafter stated, and such failure shall continue for a period of sixty (60) days, the Union Company shall have the right, at its option, to terminate and cancel this agreement and all rights of the Portland Company under the same. Notwithstanding such cancellation and termination, the right shall continue with the Union Company to collect all sums due or owing to it by the Portland Company at the time of such termination and cancellation.

Section 2. Notices under this contract shall be given in writing to the President, Vice President, General Manager or Secretary of the other Company.

ARTICLE IX

Section 1. If at any time said River Gate Industrial District or any part thereof, or the property to the east thereof and west of Portland Company's main line, is served by trackage springing from said main line, the Portland Company will admit the Union Company to joint ownership and use thereof on terms substantially the same as those herein stated.

ARTICLE X

Section 1. Each party shall have the right to locate new industries adjacent to the track illustrated in yellow on "Exhibit A." but only upon the mutual agreement of both parties.

ARTICLE XI

Section 1. In the event of the retirement of the Spokane, Portland and Seattle Railway Company from active railroad operation, or on its dissolution, it shall be privileged to assign the rights conferred to it by this agreement to the Northern Pacific Railway Company and to the Great Northern Railway Company, jointly or to either of them, as an entirety, or to the successor of said corporations. The Spokane, Portland and Seattle Railroad Company, or its said proposed assignee, may lease or mortgage the same in its entirety, as a part of its or their railroad, but otherwise than as in this Article provided the same shall not be assigned, leased or transferred, or any interest therein, without the written consent of the Union Company first obtained, and when assigned, transferred, leased or mortgaged as provided in this Article, the covenants and agreements herein contained shall bind the successors, assigns and lessees and shall inure in favor of the successors, assigns and lessees of the parties for whose benefit made.

ARTICLE XII

Section 1. This agreement shall be effective from and after January 22, 1960.

IN WITNESS WHEREOF, the parties have executed this agreement as of the day and year first herein written.

* * *

EXHIBIT NO. 45

SAMPLE (10%) OF S. P. CARLOADS SWITCHED BY PENINSULA TERMINAL RR., Portland, Ore., Year 1967

EXHIBIT

CARS	LOAD FROM	VIA	TO	SP to UP or SPS as shown DATE	TIME	UP or SPS to P.T. as shown DATE	TIME	No. of HOURS INVOLVED	P.T. to UP or SPS as shown DATE	TIME	UP or SPS to SP as shown DATE	TIME	No. HOURS INVOLVED
SP 216317	PT(1)	UP	SP						1/18/67	9:30PM	1/19/67	7:30PM	22'0"
SP 211544	PT(1)	UP	SP	1/26/67	1:30AM	1/27/67	6:30AM	29'0"	1/28/67	10:00PM	1/30/67	3:20AM	29'20"
UP 166370	SP(1)	UP	PT	1/28/67	5:00PM	1/29/67	3:20PM	22'20"	1/30/67	9:30PM	2/6/67	6:00AM	152'30"
GATX 99449	SP(1)	UP	PT	1/2/67	5:00AM	1/3/67	4:20AM	23'20"	1/16/67	10:00PM	1/17/67	3:00PM	17'0"
CP 296497	SP(1)	UP	PT	12/29/66	5:00AM	1/5/67	6:00AM	169'0"					
SP 175741	SP(1)	UP	PT	1/8/67	5:15PM	1/9/67	1:50PM	20'35"	1/13/67	11:00PM	1/14/67	11:20AM	12'20"
SP 216279	SP(1)	UP	PT	2/8/67	1:05PM	1/9/67	7:15AM	18'10"	1/13/67	9:30PM	2/14/67	4:55PM	19'25"
SP 674132	SP(1)	UP	PT	2/24/67	4:00PM	2/26/67	3:50AM	35'50"	2/28/67	10:00PM			
SP 541281	PT(1)	UP	SP	2/4/67	9:55PM	2/6/67	2:20PM	40'25"	2/8/67	3:00PM	2/9/67	3:45PM	24'45"
SP 340428	PT(1)	UP	SP	2/3/67	8:50AM	2/5/67	12:20PM	39'30"	2/8/67	3:00PM	2/9/67	3:45PM	24'45"
SP 340245	PT(1)	UP	SP	2/28/67	9:10AM	3/1/67	6:00AM	20'50"	3/3/67	11:00AM	3/4/67	6:45AM	19'45"
MILW 12681	SP(1)	UP	PT	3/29/67	9:30AM	3/30/67	6:45AM	21'15"					
GATX 99449	SP(1)	UP	PT	3/5/67	7:00PM	3/6/67	5:30AM	10'30"	3/8/67	11:00PM	3/10/67	7:00AM	32'0"
SP 181060	SP(1)	UP	PT	3/13/67	1:10AM	3/14/67	4:00AM	14'50"					
SP 217055	PT(1)	UP	SP	3/29/67	9:10PM	3/31/67	2:15PM	41'5"	4/1/67	10:00PM	4/3/67	10:10AM	36'10"
SP 541679	PT(1)	UP	SP	4/16/67	7:00PM	4/18/67	6:30AM	35'30"	4/25/67	10:30PM	4/27/67	3:10AM	28'40"
ADB 803	PT(1)	UP	SP						4/25/67	10:30PM	4/27/67	3:10AM	28'40"
SP 117583	SP(1)	UP	PT	4/2/67	8:55AM	4/3/67	1:50PM	16'55"	4/5/67	10:00PM	4/6/67	11:30PM	25'30"
SP 214752	SP(1)	UP	PT	4/7/67	9:20PM	4/9/67	2:10PM	48'50"					
SP 176348	SP(1)	UP	PT	4/15/67	5:15AM	4/16/67	3:33PM	34'18"	4/19/67	9:00PM	4/21/67	6:15AM	33'15"
SP 541695	PT(1)	UP	SP	4/11/67	1:45PM	4/13/67	9:10AM	43'25"	4/18/67	3:00PM	4/20/67	6:05AM	39'5"
IRGW 30156	PT(1)	UP	SP	4/14/67	9:3 AM	4/16/67	3:30PM	54'0"	4/19/67	3:00PM	4/20/67	11:30PM	32'30"
GRD 70125	PT(1)	UP	SP	5/1/67	10:30AM	5/2/67	2:35PM	28'5"	5/5/67	3:00PM	5/8/67	6:45AM	63'45"
SP 210795	PT(1)	UP	SP						3/6/67	5:30AM	3/9/67	10:55AM	65'25"
SP 223169	PT(1)	UP	SP						3/22/67	11:00PM	3/23/67	8:50PM	21'50"
SP 541457	PT(1)	UP	SP	4/30/67	6:20PM	5/2/67	2:35PM	43'15"	5/5/67	3:00PM	5/8/67	6:45AM	63'45"
MP 7256	SP(1)	UP	PT	5/1/67	10:30AM	5/2/67	2:35PM	28'5"					
SP 215580	SP(1)	UP	PT	5/20/67	9:05AM	5/22/67	3:33AM	42'28"	5/23/67	11:00AM	5/24/67	6:50AM	19'50"
MP 88083	SP(1)	UP	PT	5/30/67	1:10AM	5/30/67	5:00PM	15'50"	6/1/67	11:00PM	6/2/67	7:10PM	20'10"
SSW 71083	SP(1)	UP	PT	6/28/67	1:30PM	6/29/67	12:15PM	22'45"	7/3/67	10:00PM	7/10/67	9:20PM	167'20"
SP 212894	SP(3)	SPS	PT	6/21/67	8:30AM	6/22/67	3:15AM	18'45"					
SP 208586	SP(3)	SPS	PT	7/25/67	3:15PM	7/26/67	7:15PM	28'0"					
SP 673667	SP(3)	SPS	PT	8/11/67	12:35PM	8/12/67	3:10AM	14'35"	8/16/67	10:00PM	9/4/67	10:00AM	444'0"
SP 674452	SP(3)	SPS	PT	8/29/67	12:20PM	8/30/67	10:30AM	22'10"	9/8/67	11:00AM			
MAHX 36005	SP(1)	UP	PT	8/21/67	9:00AM	8/22/67	2:20PM	29'20"	8/24/67	3:00PM	8/25/67	12:00Noon	21'0"
SP 222043	PT(1)	UP	SP	9/2/67	9:00PM	9/4/67	3:20PM	42'20"	9/8/67	11:00AM	9/9/67	11:00PM	36'0"
UP 46728	SP(1)	UP	PT	9/27/67	1:00AM	9/27/67	6:30AM	5'30"					
UP 112325	SP(1)	UP	PT	9/28/67	4:35PM	9/30/67	3:15PM	46'40"					
MP 88130	PT(2)	SPS	SP						9/11/67	10:00PM	9/12/67	8:40PM	22'40"

EXHIBIT NO. 45

SAMPLE (10%) OF S. P. CARLOADS SWITCHED BY PENINSULA TERMINAL RR., Portland, Ore., Year 1967 EXHIBIT 45

LOAD FROM	VIA	TO	SP to UP or SPS as shown DATE	TIME	UP or SPS to P.T. as shown DATE	TIME	No. of HOURS INVOLVED	P.T. to UP or SPS as shown DATE	TIME	UP or SPS to SP as shown DATE	TIME	No. HOURS INVOLVED
PT(1)	UP	SP						1/18/67	9:30PM	1/19/67	7:30PM	22'0"
PT(1)	UP	SP	1/26/67	1:30AM	1/27/67	6:30AM	29'0"	1/28/67	10:00PM	1/30/67	3:20AM	29'20"
SP(1)	UP	PT	1/28/67	5:00PM	1/29/67	3:20PM	22'20"	1/30/67	9:30PM	2/6/67	6:00AM	152'30"
SP(1)	UP	PT	1/2/67	5:00AM	1/3/67	4:20AM	23'20"	1/16/67	10:00PM	1/17/67	3:00PM	17'0"
SP(1)	UP	PT	12/29/56	5:00AM	1/5/67	6:00AM	169'0"					
SP(1)	UP	PT	1/8/67	5:15PM	1/9/67	1:50PM	20'35"	1/13/67	11:00PM	1/14/67	11:20AM	12'20"
SP(1)	UP	PT	2/8/67	1:05PM	1/9/67	7:15AM	18'10"	1/13/67	9:30PM	2/14/67	4:55PM	19'25"
SP(1)	UP	PT	2/24/67	4:00PM	2/26/67	3:50AM	35'50"	2/28/67	10:00PM			
PT(1)	UP	SP	2/4/67	9:55PM	2/6/67	2:20PM	40'25"	2/8/67	3:00PM	2/9/67	3:45PM	24'45"
PT(1)	UP	SP	2/3/67	8:50AM	2/5/67	12:20PM	39'30"	2/8/67	3:00PM	2/9/67	3:45PM	24'45"
PT(1)	UP	SP	2/28/67	9:10AM	3/1/67	6:00AM	20'50"	3/3/67	11:00AM	3/4/67	6:45AM	19'45"
SP(1)	UP	PT	3/29/67	9:30AM	3/30/67	6:45AM	21'15"					
SP(1)	UP	PT	3/5/67	7:00PM	3/6/67	5:30AM	10'30"	3/8/67	11:00PM	3/10/67	7:00AM	32'0"
SP(1)	UP	PT	3/13/67	1:10AM	3/14/67	4:00AM	14'50"					
PT(1)	UP	SP	3/29/67	9:10PM	3/31/67	2:15PM	41'5"	4/1/67	10:00PM	4/3/67	10:10AM	36'10"
PT(1)	UP	SP	4/16/67	7:00PM	4/18/67	6:30AM	35'30"	4/25/67	10:30PM	4/27/67	3:10AM	28'40"
PT(1)	UP	SP						4/25/67	10:30PM	4/27/67	3:10AM	28'40"
SP(1)	UP	PT	4/2/67	8:55AM	4/3/67	1:50PM	16'55"	4/5/67	10:00PM	4/6/67	11:30PM	25'30"
SP(1)	UP	PT	4/7/67	9:20PM	4/9/67	2:10PM	42'50"					
SP(1)	UP	PT	4/15/67	5:15AM	4/16/67	3:33PM	34'18"	4/19/67	9:00PM	4/21/67	6:15AM	33'15"
PT(1)	UP	SP	4/11/67	1:45PM	4/13/67	9:10AM	43'25"	4/18/67	3:00PM	4/20/67	6:05AM	39'5"
PT(1)	UP	SP	4/14/67	9:3 AM	4/16/67	3:30PM	54'0"	4/19/67	3:00PM	4/20/67	11:30PM	32'30"
PT(1)	UP	SP	5/1/67	10:30AM	5/2/67	2:35PM	28'5"	5/5/67	3:00PM	5/8/67	6:45AM	63'45"
PT(1)	UP	SP						3/6/67	5:30AM	3/9/67	10:55AM	65'25"
PT(1)	UP	SP						3/22/67	11:00PM	3/23/67	8:50PM	21'50"
PT(1)	UP	SP	4/30/67	6:20 PM	5/2/67	2:35PM	43'15"	5/5/67	3:00PM	5/8/67	6:45AM	63'45"
SP(1)	UP	PT	5/1/67	10:30AM	5/2/67	2:35PM	28'5"					
SP(1)	UP	PT	5/20/67	9:05AM	5/22/67	3:33AM	42'28"	5/23/67	11:00AM	5/24/67	6:50AM	19'50"
SP(1)	UP	PT	5/30/67	1:10AM	5/30/67	5:00PM	15'50"	6/1/67	11:00PM	6/2/67	7:10PM	20'10"
SP(1)	UP	PT	6/28/67	1:30PM	6/29/67	12:15PM	22'45"	7/3/67	10:00PM	7/10/67	9:20PM	167'20"
SP(3)	SPS	PT	6/21/67	8:30AM	6/22/67	3:15AM	18'45"					
SP(3)	SPS	PT	7/25/67	3:15PM	7/26/67	7:15PM	28'0"					
SP(3)	SPS	PT	8/11/67	12:35PM	8/12/67	3:10AM	14'35"	8/16/67	10:00PM	9/4/67	10:00AM	444'0"
SP(3)	SPS	PT	8/29/67	12:20PM	8/30/67	10:30AM	22'10"	9/8/67	11:00AM			
SP(1)	UP	PT	3/21/67	9:00AM	8/22/67	2:20PM	29'20"	8/24/67	3:00PM	8/25/67	12:00Noon	21'0"
PT(1)	UP	SP	9/2/67	9:00PM	9/4/67	3:20PM	42'20"	9/8/67	11:00AM	9/9/67	11:00PM	36'0"
SP(1)	UP	PT	9/27/67	1:00AM	9/27/67	6:30AM	5'30"					
SP(1)	UP	PT	9/28/67	4:35PM	9/30/67	3:15PM	46'40"					
PT(2)	SPS	SP						9/11/67	10:00PM	9/12/67	8:40PM	22'40"

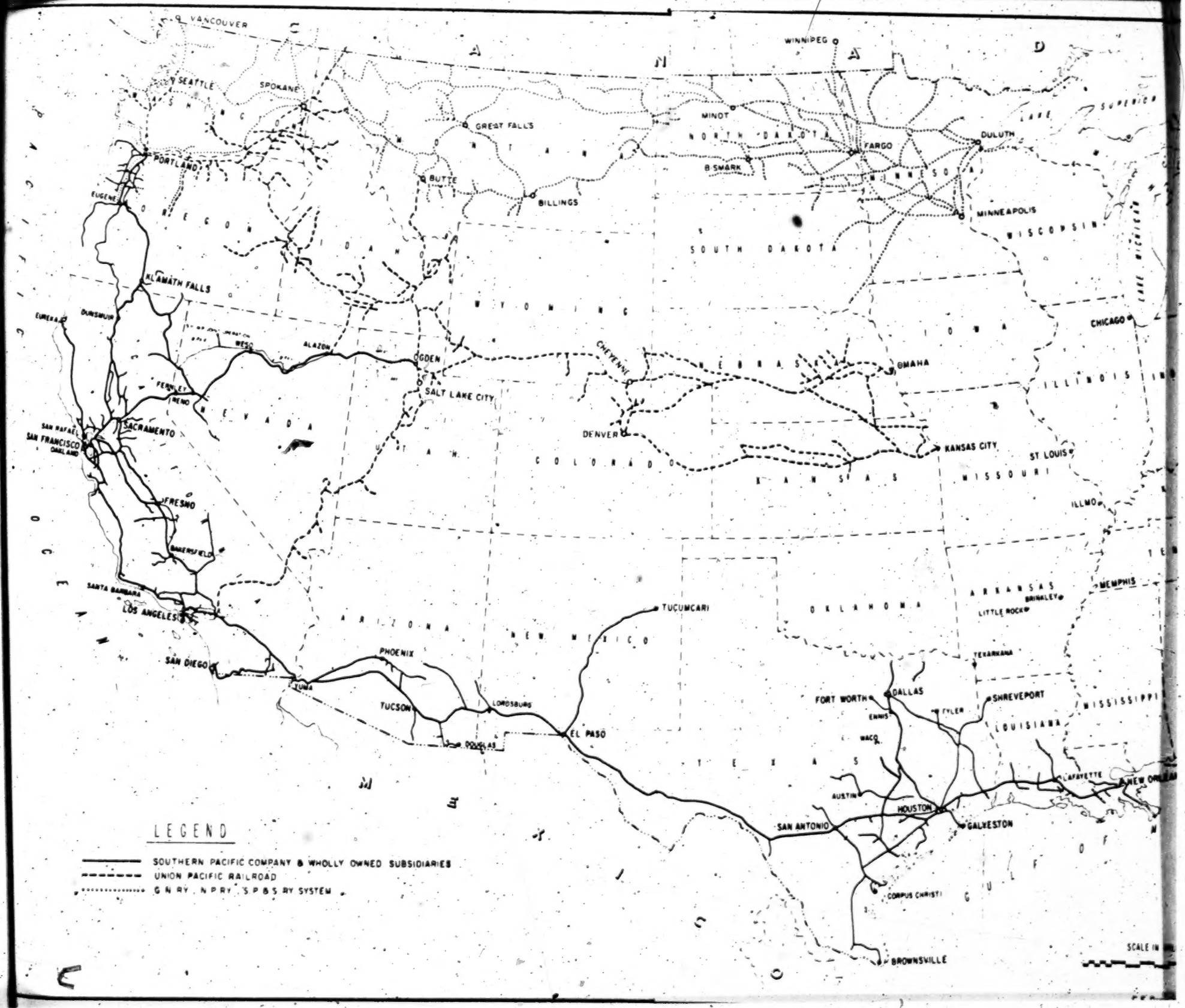
(1) Time recorded is delivery betwee UP-SP at Albina, C

(2) Time recorded i delivery from SPS to Portland Termir RR

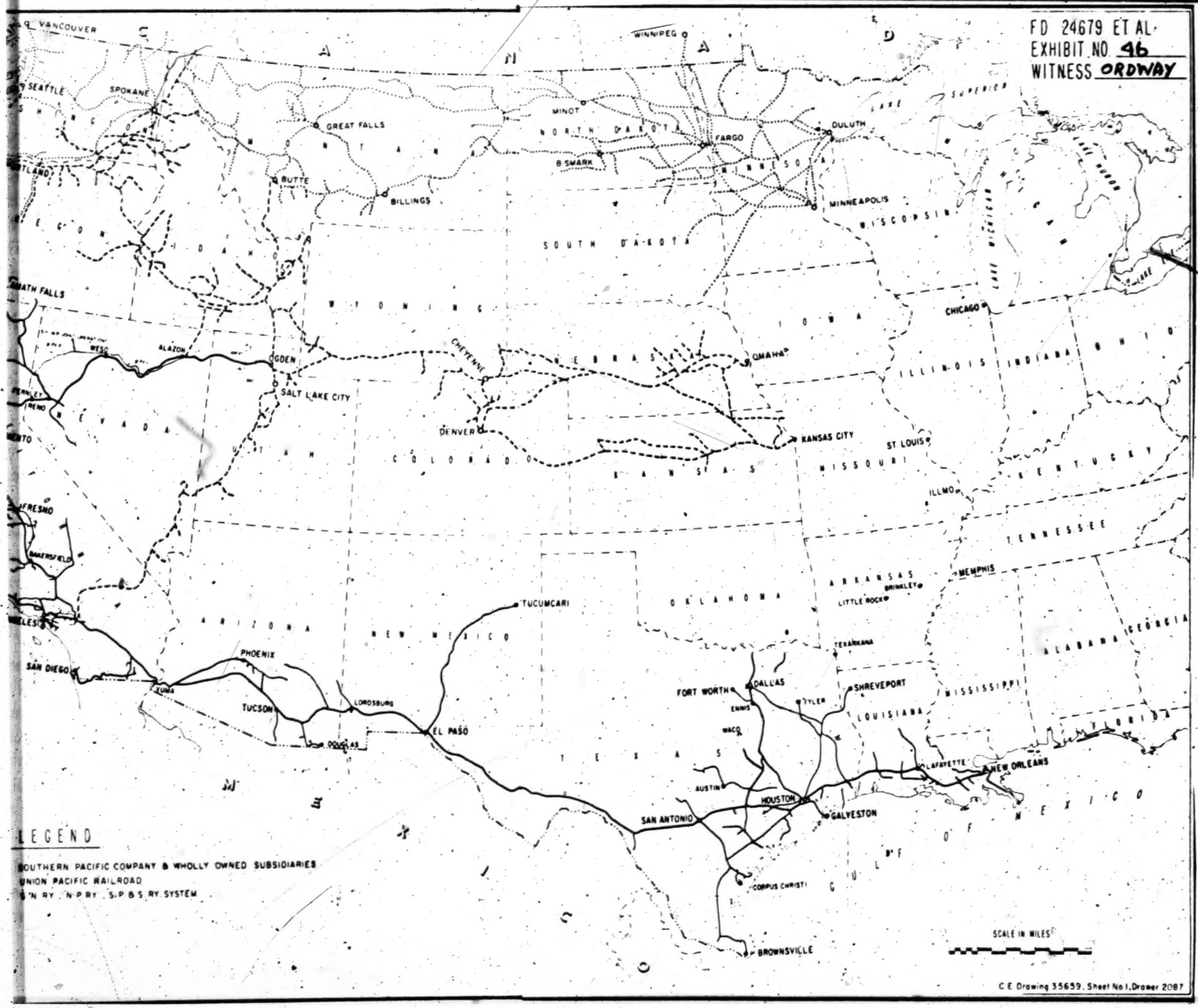
(3) Time recorded delivery from Port Terminal to SPS

EXHIBIT NO. 45

CARS	LOAD FROM	VIA	TO	SP to UP or SPS AS SHOWN DATE	TIME	UP or SPS to P.T. AS SHOWN DATE	TIME	No. of HOURS INVOLVED	P.T. to UP or SPS AS SHOWN DATE	TIME	UP or SPS to SP AS SHOWN DATE	TIME	No. HOURS INVOLVED
GATX 79576	SP(1)	UP	PT	10/24/67	5:00PM	10/25/67	2:20PM	21'20"	10/27/67	11:59PM	10/28/67	2:00PM	14'1"
MP 83050	PT(2)	SPS	SP						12/17/67	12:10PM	12/17/67	7:00PM	6'50"
SP 217877	SP(3)	SPS	PT	12/4/67	9:00AM	12/5/67	1:00AM	16'0"	12/7/67	11:00AM	12/14/67	6:30AM	163'30"
				AVERAGE NUMBER OF HOURS INVOLVED:				32'10"					55'16"


VANCOUVER
WINNIPEG
SEATTLE
SPOKANE
PORTLAND
EUGENE
GREAT FALLS
MINOT
NORTH DAKOTA
FARGO
DULUTH
BISMARK
BUTTE
BILLINGS
MINNEAPOLIS
SOUTH DAKOTA
KLAMATH FALLS
EUREKA
DUNSMUIR
WYOMING
CHICAGO
WEED
ALAZON
OGDEN
CHEYENNE
OMAHA
FERNLEY
RENO
SALT LAKE CITY
SAN RAFAEL
SAN FRANCISCO
OAKLAND
SACRAMENTO
DENVER
KANSAS CITY
ST LOUIS
FRESNO
ILLMO
BAKERSFIELD
SANTA BARBARA
LOS ANGELES
TUCUMCARI
OKLAHOMA
ARKANSAS
BRINKLEY
LITTLE ROCK
MEMPHIS
TEXARKANA
PHOENIX
SAN DIEGO
YUMA
FORT WORTH
DALLAS
SHREVEPORT
TUCSON
LORDSBURG
ENNIS
TYLER
MISSISSIPPI
EL PASO
WACO
LOUISIANA
LAFAYETTE
AUSTIN
HOUSTON
SAN ANTONIO
GALVESTON
CORPUS CHRISTI
BROWNSVILLE
LEGEND
SOUTHERN PACIFIC COMPANY & WHOLLY OWNED SUBSIDIARIES
UNION PACIFIC RAILROAD
G N RY . N P RY . S P & S RY SYSTEM
SCALE IN

FD 24679 ET AL
EXHIBIT NO. 46
WITNESS ORDWAY



LEGEND

SOUTHERN PACIFIC COMPANY & WHOLLY OWNED SUBSIDIARIES
UNION PACIFIC RAILROAD
G N RY., N P RY., S P & S RY. SYSTEM

C E Drawing 35659, Sheet No 1, Drawer 2087

EXHIBIT 47

STATEMENT OF LARRY H. DUGAN

My name is Larry H. Dugan and my business address is 611 White Building, Seattle, Washington 98101. I am Vice President and Western Counsel, Executive Department, of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which is commonly known as the Milwaukee Road. For convenience, I will from time to time refer to it simply as "the Milwaukee".

I was graduated from Drake University in 1935 with the degree of Bachelor of Laws. I engaged in private practice in Iowa from 1935 to 1939 when I entered the service of the Milwaukee, in its Law Department in Chicago. I was appointed to my present position in Seattle in 1948. I am admitted to practice law in the states of Iowa, Illinois and Washington.

The Milwaukee's petition for inclusion as joint owner of Peninsula Terminal Company was authorized by Resolution of its Board of Directors, dated September 21, 1967. A certified copy of said resolution is marked as my Exhibit No. 48 (LHD-1).

The Milwaukee Road operates in fourteen states, its main lines extending from Seymour, Indiana through Chicago, Twin Cities, Minnesota to Seattle and Tacoma, Washington on Puget Sound, and from Tacoma to Longview, Washington on the lower Columbia River. Its main lines also extend from Chicago to Council Bluffs and to Kansas City and connections beyond these gateways. My Exhibit No. 49 (LHD-2) is a map of the principal lines of the Milwaukee.

The present Milwaukee Road was organized under the laws of the state of Wisconsin in 1927, and in the following year, with Commission approval (131 I. C. C. 673), acquired

the properties of the former Chicago, Milwaukee & St. Paul Railway Company (referred to below as "the St. Paul Company") as the result of a foreclosure sale in 1926. The St. Paul Company was placed in receivership in 1925, largely, as the Commission noted, as a consequence of its Puget Sound extension in 1909 at a cost in excess of $250,000,000.00.

The Milwaukee Road had its beginning 120 years ago in a predecessor Company, The Milwaukee & Waukesha Railroad Company, organized in 1847. In 1863, this company was succeeded by the Milwaukee & St. Paul Railroad Company. In 1874 the name was changed to Chicago, Milwaukee & St. Paul Railway Company, which continued until succeeded by the present Company in the manner above mentioned.

In 1935 the present Company applied for reorganization under the Bankruptcy Act, from which it emerged in 1945 as the reorganized company pursuant to a Plan of Reorganization approved by the Commission and confirmed by the Federal District Court in Chicago.

Meanwhile, the properties of Chicago, Terre Haute & Southeastern Railway Company (successor to three prior companies) were leased to the St. Paul Company in 1921 for 999 years. Following reorganization, the present Company became lessee of these properties early in 1946, at which time the lease and all outstanding mortgages and bonds were modified. Some two years later the present company acquired the ownership of all of the Terre Haute properties and assumed its mortgage indebtedness.

The Milwaukee Road is not owned or controlled by any other railroad and does not own or control any of the parties to this proceeding, directly or indirectly. It does not have any common officers or directors with any of said parties.

The Milwaukee's Puget Sound extension from the Missouri River at Mobridge, South Dakota was completed to Seattle in 1908 and to Tacoma in 1909, the same year the Union Pacific was granted trackage rights from Portland to Tacoma and the Great Northern from Seattle to Portland over the lines of the Northern Pacific and SP&S. The SP&S was constructed from Spokane to Portland via Vancouver, Washington in 1909.

Between 1909 and 1918 the Milwaukee constructed or acquired most of its branch lines located west of Mobridge, South Dakota. These include its Central Montana line extending north from its main line to Great Falls, Montana with branches therefrom: its Elk River Branch in Idaho which connects at Bovill, Idaho with the Washington, Idaho & Montana Railroad, a subsidiary of the Milwaukee Road; its lines to Spokane and to Coeur d'Alene and Metaline Falls and its Moses Lake and Marcellus branches, all in Northern Idaho and Eastern Washington; its Morton, Raymond and Grays Harbor branches south and west of Tacoma; its Everett line, its Bellingham to Sumas line, and its Port Angeles line, north and west of Seattle, all in Western Washington.

In 1923, the Longview, Portland & Northern, an independent railroad, constructed a line from Longview along the west side of the Cowlitz River to Ryderwood, Washington, located about 20 miles distant from the Milwaukee's Raymond branch. In 1930, the Milwaukee planned to construct a line to connect with the LP&N. At the same time the Northern Pacific, Great Northern and Oregon-Washington Railroad & Navigation Company (OWR&N), a Union Pacific subsidiary, applied to the Commission to purchase the lines of the LP&N. The Milwaukee intervened and applied to acquire a one-fourth interest in the lines of the LP&N and for trackage rights from Chehalis Junction and

Vader Junction over the Northern Pacific and LP&N to Longview, which the Commission approved. See Finance Docket No. 8484, 175 I. C. C. 253 and 644. Since 1931, the Milwaukee's operations have extended to Longview, Washington. The LP&N line washed out in a flood in 1933 and thereafter, to avoid rebuilding the LP&N, the Milwaukee was granted trackage rights over the Northern Pacific line from Olequa, Washington to Longview Junction. See Finance Docket No. 10390, 207 I. C. C. 438. At Longview, all four lines have trackage rights over the old LP&N terminal facilities but actual switching is performed for all lines by the LP&N, an independent operating Company, under contract, thus making all shippers and Port facilities at Longview on-line industries, available to all trunk lines equally.

When the Great Northern, Northern Pacific and Burlington Lines applied to the Commission in 1961 for authority to consolidate their properties and franchises and for the consolidated company to acquire their respective subsidiaries and to lease the properties and franchises of the Spokane, Portland & Seattle Railway Company (SP&S) for operation as a single entity by the new company to be known as Great Northern Pacific—Burlington Lines, Inc., the Milwaukee intervened in opposition unless six specific conditions were imposed. See Finance Docket No. 21478, sometimes called the Northern Lines merger case. After extensive hearings, in which the Milwaukee took an active part, an examiner's report was issued recommending approval of the proposed transactions, subject to certain conditions including three of the conditions proposed by the Milwaukee. The Milwaukee and other parties took exception, and following oral argument, the Commission issued its report and order of March 31, 1966, denying the proposed merger of the Northern Lines.

The Commission at that time concluded, *inter alia,* that the Milwaukee would be unable to provide a service on a basis competitive with the Northern Lines. In their petition for reconsideration, the Northern Lines offered to accept all of proposed Milwaukee conditions, pointing out that these conditions would be even more beneficial in event the Milwaukee and the Chicago & North Western Railroad were consolidated pursuant to their pending application in Finance Docket No. 24182, et al. The Milwaukee and Northern Lines then entered into an agreement, dated October 26, 1966, covering the basis for implementing the six Milwaukee conditions in the event the Northern Lines merger was eventually approved.

After further hearing and argument, the Commission reversed its March 31, 1966, decision and approved the Northern Lines merger, subject to the six conditions proposed by the Milwaukee. The Milwaukee's conditions are set forth in Appendix L to the Commission's Report and Order dated November 30, 1967, 333 I. C. C. 228. For the convenience of the parties they are reproduced in my Exhibit 50 (LHD-3).

* * *

EXHIBIT 50

Milwaukee Conditions
in
Great Northern Pacific & Burlington Lines, Merger
Finance Docket 21478

Excerpt from Appendix L to
Commission's Report on Reconsideration
and Further Hearing
Decided November 30, 1967,
331 I. C. C. 228, 356-358

"23. NuCo shall publish and file appropriate tariffs and routing schedules to be effective on and after the date of consummation of the merger, providing for the opening of junctions and gateways at Linton and Fargo, N. Dak., and [Miles City, Great Falls, Butte and] Missoula, Mont., and Spokane, Seattle, and Tacoma, Wash., with respect to traffic moving through said junctions, at the lowest applicable rates available via the Twin Cities and Sioux City gateways (on a reciprocal basis, with the Milwaukee affording equal privileges to NuCo) with just and reasonable divisions thereof as may be agreed upon, or fixed by this Commission if such carriers cannot so agree, and the Milwaukee shall, on traffic obtained pursuant to this condition or those in paragraph 24, below, open or keep open, in similar manner, its junctions at Twin Cities, Sioux City, and Council Bluffs with North Western, and on traffic obtained pursuant to this condition or those in paragraph 24 below, open or keep open in similar manner its junction at Twin Cities with Soo Line.

"Routing via the 11 first-named gateways so opened shall be restricted to one such gateway on any single shipment, and to traffic destined to or billed for transit

or stopoff at any station on the other line beyond the junction up to and including the terminal area of the next junction, except that routing via Linton and Fargo shall be provided to and from Billings and Great Falls, Mont., and stations intermediate thereto.

"24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission:

"(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers;

"(b) Permitting that railroad to acquire trackage rights over the lines of NuCo between Renton and Snohomish, Wash., and between Everett and Bellingham, Wash., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as parties may agree or as determined by this Commission in the event of their

inability to agree, trackage rights to operate freight trains over NuCo lines between Renton and Snohomish, and between Everett and Bellingham; and

"(c) Permitting that railroad to extend its service to Billings, Mont., and the handling of its traffic by NuCo from and to Judith Gap, Miles City, and Bozeman, Mont. on the one hand, and, on the other, to, from, and through Billings, Mont., including the switch of cars to or from industries at Billings, NuCo shall impartially handle the empty and loaded cars of that railroad from, to and through Billings as though a station on the other road, such cars to be delivered to and returned by NuCo at Miles City, Judith Gap, or Bozeman, according to the direction of the traffic, upon such fair and reasonable terms as the parties may agree or as may be determined by this Commission in the event of their inability to agree.

"25. NuCo shall join with the Milwaukee in:

"(a) Eliminating at their common points the dual basis of switch charges by canceling in their respective tariffs the higher switch charges required to be paid when absorbed by the line-haul carrier, and by providing in their respective tariffs for the absorption by the line-haul carrier of switch charges on all traffic, subject to a reasonable minimum carload revenue, and

"(b) Reestablishing rate relationships via all routes with that railroad when, by reason of this unification, the relationships of rates via such routes with rates via other routes of the component lines merged into or operated under lease by NuCo are disturbed."

EXHIBIT 53

STATEMENT OF J. T. HAYES

Exhibit (JTH-1).

My name is James T. Hayes. My business address is 538 Union Station, Chicago, Illinois, and my present position with the Milwaukee Railroad is Special Assistant to President. I started with the Milwaukee Railroad as a clerk in the operating department in 1926 and with the exception of four years in the army during World War II have been continuously employed in various clerical positions and as traveling car agent, transportation inspector, trainmaster, assistant superintendent, division superintendent, assistant to vice president-operations, and since August 1, 1966 have been on my present assignment.

In the so-called Northern Lines Case, F. D. 21478, et al, involving the proposed unification of Great Northern, Northern Pacific, Chicago, Burlington & Quincy, Pacific Coast, and Spokane, Portland & Seattle Railways, the Milwaukee Road asked that the Commission predicate its approval of this merger on the granting by the new GNP&B Company to the Milwaukee of six conditions which the Milwaukee requested so that it could maintain competitive service after the merger. One of these conditions was entry into Portland.

The Interstate Commerce Commission approved the merger in its Order dated December 15, 1967. Prior to this time the Milwaukee and the Northern Lines reached an agreement dated October 24, 1966, setting forth the terms upon which the Milwaukee would receive the conditions granted it in the aforesaid proceedings. An excerpt from this agreement covering Condition No. 2 granting the Milwaukee Entry into Portland and Trackage Rights between Longview Junction and Portland is attached hereto as an

Our agreement with the Northern Lines provides that the new company or SP&S will grant to the Milwaukee trackage rights over present Northern Pacific and SP&S tracks between Longview Junction, Washington and Hoyt Street Freight Yard in Portland, Oregon, including all main, second main, passing and industry tracks. It is important to Milwaukee's interest that it also have access to the Peninsula Terminal facilities on the same basis as other lines.

Attached, Exhibit (JTH-2), is a map of the Portland area. It will be noted that Peninsula Terminal Company occupies a strategic location for an extension of trackage into the northern part of the proposed Rivergate Industrial District, and as this district develops the importance of North Portland as an interchange point will increase, particularly if all trunk lines serving Portland have access to it. The Milwaukee Road is not yet in Portland, of course, and we are unfamiliar with all of the interchange practices that are in effect in this area. However, it is our understanding that Guild Lake Yard and the Depot Yard are the principal interchange points between the Northern Lines and Union Pacific and Southern Pacific, with the Portland Terminal Company crews handling the moves between Guild Lake Yard and the Depot Yard, a distance of approximately two miles. Union Pacific and Southern Pacific have a direct train yard interchange between themselves. The Northern Lines and Union Pacific interchange with Peninsula Terminal at North Portland. There is also a physical interchange of cars between Northern Lines and Union Pacific at Barnes Yard.

It is approximately six miles from North Portland to Guild Lakes on the SP&S double track main line. At East St. Johns, an intermediate station between North Portland Junction and Guild Lake one mile south of North Portland, a connection off the SP&S leads into the Barnes Yard.

GNP&B and Union Pacific will each have the right to reach and interchange at North Portland with the Peninsula Terminal Company, or its successor. Milwaukee requests a similar right so that its traffic can be handled expeditiously and in the same manner as GNP&B traffic without having to be carried past this interchange point and through a major interchange such as Guild Lake or the Depot Yard some 6 and 8 miles distant, respectively, and then handled by one additional intermediate carrier, because such handling would inevitably result in a day's delay to the cars. The best service Milwaukee could provide to this area would be to set out and pick up cars at North Portland with its road trains, thereby reducing terminal handling to a minimum and eliminating the delays involved, and we would propose to do this. However, if the pattern of operation after merger would not permit this, it still would be our intention to work out an efficient means of interchanging this traffic via North Portland.

The Peninsula Terminal Company is the only remaining railroad in Portland that is not already owned wholly or jointly by Union Pacific, Southern Pacific, or the proposed GNP&B Company, and therefore represents the last opportunity the Milwaukee will have to acquire physicial ownership within the Portland Switching District. It is true that at the present time the Commission has suspended its Order in Finance Docket Nos. 21478, et al, in order to take under advisement various petitions for reconsideration, however it is felt that these petitions will be disposed of promptly and that the GNP&B merger will be consummated in the near future. The Milwaukee Road will then be able to serve Portland with its own road trains, make its car fleet available to shippers in this area, and provide single line service between Portland and the industries on the Milwaukee Road system. Ownership in the Peninsula Terminal Company,

with the right to reach it, will put Milwaukee into Portland on the basis of some physical ownership as well as the Joint Facility basis under our agreement with the Northern Lines, and will insure our participation in the development of this area.

I.C.C. F.D. No. 24679
Exhibit No. . . . (JTH-1)

EXHIBIT JTH-1

EXCERPT FROM NORTHERN LINES AGREEMENT RELATING TO CONDITION NO. 2—ENTRY INTO PORTLAND AND TRACKAGE RIGHTS BETWEEN LONGVIEW JUNCTION AND PORTLAND

AGREEMENT BETWEEN CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND GREAT NORTHERN PACIFIC & BURLINGTON LINES, INC.

Whereas, Great Northern Railway Company (Great Northern), Northern Pacific Railway Company (Northern Pacific), Chicago, Burlington & Quincy Railroad Company (Burlington), Spokane, Portland and Seattle Railway Company (SP&S) and Great Northern Pacific & Burlington Lines are applicants in Finance Docket Nos. 21478, *et al.*, for authority to consummate certain transactions which would result in the consolidation of Greeat Northern, North-

ern Pacific and Burlington into Great Northern Pacific & Burlington Lines, Inc., (which, as constituted following any such consolidation, shall be referred to herein as New Company), and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) as intervened in said proceedings in order to protect its interests;

Now, therefore, the parties hereto do hereby agree as follows:

I.

Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, *et al.*, the Wilwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:

Condition No. 1—Opening of Eleven New Gateways.

Condition No. 2—Entry into Portland and Trackage Rights between Longview and Portland.

Condition No. 3—Renton-Snohomish, and Everett-Bellingham Trackage Rights.

CONDITION NO. 2—ENTRY INTO PORTLAND AND TRACKAGE RIGHTS BETWEEN LONGVIEW JUNCTION AND PORTLAND.

1. To the extent that New Company or SP&S can do so, it will grant to Milwaukee trackage rights over present Northern Pacific and SP&S tracks between Longview Junction, Washington, and Portland, Oregon including all main, second main, passing and industry tracks, and over SP&S tracks in the Line D valuation area in Portland, and the right to construct at its own cost any necessary cross-overs, to enable Milwaukee to operate freight trains, engines, and cars between Longview Junction and the Hoyt Street freight yard of the SP&S in Portland, with the right to handle freight traffic to or from Longview Junction, Port-

land, and all intermediate points regardless of origin or destination of said traffic.

2. Milwaukee shall have the right at its expense to string and maintain telephone and telegraph wires upon any pole line along said tracks and shall have the right to participate in use of microwave communication system on a joint facility basis between Portland and Seattle or Tacoma and intermediate points, to the extent that New Company or SP&S can grant such rights.

3. Milwaukee shall have the right to deliver cars to New Company or SP&S, in interchange or for switching, at the SP&S yard in Vancouver, Washington, and its Hoyt Street freight yard in Portland.

4. To the extent the New Company can do so, it will authorize or approve the delivery of cars by Milwaukee at Guild's Lake Terminal in Portland for interchange to or switching by any railroad using said Terminal.

5. Milwaukee shall have use of the said SP&S yard in Vancouver and of Hoyt Street freight yard in Portland to receive cars in interchange from the New Company, SP&S, and any other carrier reaching such yard.

6. To the extent New Company can do so, it will authorize or approve the Milwaukee's receipt of cars in interchange at Guild's Lake Terminal from the New Company, SP&S, or any carrier reaching said terminal, on fair and reasonable terms for the use of necessary trackage as may be arranged between the owners of said Terminal and Milwaukee.

7. Milwaukee shall have use of Hoyt Street freight yard as a terminal freight yard for its trains operating to and from Portland and use of necessary storage, team track, and TOFC facilities in Hoyt Street freight yard.

8. Milwaukee shall have use of Guild's Lake terminal to the extent New Company can so authorize or approve as a terminal freight yard for its trains operating to and from Portland on fair and reasonable terms as may be arranged between owners of said Terminal and Milwaukee.

9. At request of the Milwaukee, New Company, or SP&S in a fair and impartial manner will perform all necessary freight car switching, including making up and breaking up of trains, call train crews for Milwaukee; make emergency repairs to Milwaukee's locomotives upon request; furnish locomotive fuel, water, and sand upon request; inspect, and make on A.A.R. billing necessary repairs to Milwaukee freight cars; and upon request clean, ice and service said cars. All said services are to be performed for Milwaukee at joint facility costs.

10. New Company or SP&S at request of the Milwaukee wil handle in a fair and impartial manner by its employees at its freight station in Portland the carload freight business of the Milwaukee jointly and in common with the carload freight business of the New Company or SP&S, for which services Milwaukee shall pay on the same basis as now in effect among users of Line D. New Company shall in like manner perform like services at stations intermed-ate between Longview Junction and Portland, the cost of which is to be included in the maintenance and operation costs.

11. To the extent that New Company or SP&S can do so, it will at the request of Milwaukee and in a fair and impartial manner perform at joint facility costs the switching of Milwaukee cars at Kalama, Vancouver, and Portland to or from industries and connecting carriers to the extent such service is performed by New Company or SP&S for itself or any other carrier.

12. Provisions similar to those in Article I, Sections 3, 4 and 5, Article, II, Sections 4, 6 and 7, and Article III, Sections 1, 2 and 4 in the agreement between Northern Pacific and Milwaukee dated November 1, 1931 covering use by Milwaukee of tracks of Northern Pacific between Olequa and Chehalis, Washington, shall be incorporated herein.

13. Milwaukee shall pay as rental for the trackage rights herein granted, including the use of Hoyt Street freight yard as a terminal freight yard, its proportion on a user basis of 5% interest of the valuation based on the original cost plus additions and betterments less retirements of the said trackage over which Milwaukee performs line haul or switching operations and of such other freight facilities as are used by Milwaukee, plus a use proportion on wheelage basis of maintenance and operation and taxes of said trackage and facilities.

14. Milwaukee shall bear its use proportion (determined in the same manner as its proportion of maintenance and operation is determined) of the service loss resulting from property retired and not replaced, measured by the use Milwaukee has made of the property retired.

15. Milwaukee will make all payments to the Treasurer of New Company at the City of St. Paul, Minnesota. Bills for maintenance and operation shall be rendered monthly by New Company as soon as may be after the close of each month, and shall be paid within sixty (60) days. Payment of such bills shall not be delayed for errors which are not serious and important but bills shall be paid as rendered notwithstanding any error of ordinary character likely to occur in railroad accounts, the necessary corrections to be made in subsequent bills.

16. Milwaukee shall not be charged for operation of any telephone or telegraph line not used in its business, but shall be charged for entire expense of any wires placed upon poles of New Company or SP&S and for a proportion of costs of maintaining each mile of pole line which number of wires placed by Milwaukee in such line bears to total number of wires therein.

17. Milwaukee shall have no right to admit any other company as user of the trackage and facilities or to handle the business of any other company, except that the rights herein acquired by Milwaukee shall be appurtenant to and run with its railroad and shall inure to the benefit of any successor company or may be sold, assigned, leased, or mortgaged by Milwaukee or successor company in connection with and as part of its railroad.

18. Agreement shall expire on the expiration date (November 1, 2030) of the agreement of November 1, 1931, referred to in Paragraph 12, above, or upon two years' notice in writing by Milwaukee.

19. The term "New Company" includes Great Northern Pacific and Burlington Lines, Inc. and any successor company. The term "SP&S" includes Spokane, Portland and Seattle Railway Company and any successor company. The term "Milwaukee" includes Chicago, Milwaukee, St. Paul and Pacific Railroad Company and any successor company.

EXHIBIT 54

STATEMENT OF P. J. CULLEN

My name in P. J. Cullen. I am Assistant Vice President—Sales and Service of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which I shall refer to as the Milwaukee, and my business address is Room 784, Union Station Building, Chicago, Illinois.

I have been engaged in traffic and transportation work in various capacities on behalf of my Company for the past forty-three years. I have held various positions in rate section of the General Freight Department in Chicago and was Assistant General Freight Agents (Rates) and the tariff issuing agent before entering the Sales and Service Department of the Milwaukee. I was appointed Western Traffic Manager at Seattle, Washington, on July 1, 1955; Assistant General Freight Traffic Manager at Chicago on July 1, 1959. My headquarters were again transferred to Seattle effective September 1, 1967. On October 16, 1964, I was appointed General Freight Traffic Manager and on September 1, 1965, I was again transferred to Chicago. On March 1, 1966, I was appointed to my present position.

In my various positions in the Rates and Divisions and the Sales and Service Departments of the Milwaukee it has been my duty to learn what the shippers in our territory demand in the way of rates and service and what factors influence their choice of carriers in the routing of traffic. In carrying out my duties I have supervised the traffic activities of our agents and the work of our traffic solicitors at various cities throughout the country, have analyzed their reports to me, and have personally called upon numerous shippers to discuss their transportation and distribution problems and to seek the routing of their freight traffic

over the lines of the Milwaukee. During my two assignments to the Seattle office of the Milwaukee, my jurisdiction extended over all of our traffic agencies in the States of Washington, Oregon, Idaho and Montana and the Province of British Columbia.

I have made and supervised studies of traffic changes due to various railroad merger and control proposals and various conditions proposed therein and have reviewed and analyzed similar studies made by other railroads and have testified at Commission hearings in connection therewith. Some of the proceedings for which I have made and examined studies are the Northern Lines merger case, the Milwaukee-North Western merger case and the Union Pacific-Rock Island merger case. As the result of these studies, I have had the opportunity to apply the knowledge I have gained over the years in traffic work in formulating and evaluating the factors which affect the shippers' choice of carriers in routing traffic and to compare this with the opinions of other traffic officers.

The Milwaukee Road since 1958 has had a market and cost research department staffed with market and cost analysts. In 1958 the Milwaukee began flexivan trailer on flat car service and expanded this to all types of piggy backing in 1962. We now participate in all five piggy back plans and variations thereof. In 1967 the Milwaukee handled 61,140 trailers on flat cars with revenues of $12.8 million. The Milwaukee has piggy back unloading and loading facilities at 58 Milwaukee Road stations throughout its territory.

In 1963, we instituted a 55½ hour schedule from Chicago to Seattle and 67¼ hour schedule from Seattle to Chicago, the fastest regular trans-continental freight schedules.

In our car fleet of approximately 39,000 cars, we have covered hopper cars, air slide cars, covered gondolas, auto rack cars, TOFC cars and a large number of refrigerated trailers, and also heavy duty multi-wheel flat cars for very heavy loading which few railroads can supply. Our fleet of special damage free box cars and load divider cars is one of the largest of any railroad in the country. We also have a large number of wide door and plug door box cars for lumber and plywood loading. The motive power of the Milwaukee is composed of approximately 700 diesel and 67 electric engines.

In 1959 we instituted our car tracing and expediting program called Carscope. Between 1959 and 1965 this system was continuously updated with the addition of new reporting stations. In 1966 a complete study of this system was made and in 1967 a third generation, direct access IBM 360 computer was installed. The function is to trace and expedite carload shipments and keep an up to date record of the location of special equipment and other equipment in short demand. Another function is to serve the shipper in the diversion and reconsignment of carload shipments and to provide information concerning unavoidable delays, etc. Our railroad has centralized these functions, providing more convenient and current information by which shippers and consignees can schedule their own manufacturing, distribution, warehousing and marketing requirements.

The Milwaukee has 57 traffic offices located throughout the United States and Canada. Its traffic solicitors cover most traffic producing points on a regular basis. These offices and their activities help us to keep in touch with traffic developments and the markets for our rail transportation to and from points throughout the country and overseas

The Milwaukee has been active in the development of the movement of import and export traffic, especially through the West Coast ports which it serves. It recently opened a traffic office in Japan to promote such traffic.

Portland is an important seaport as well as distribution point for most of Oregon and a large part of Southwestern Washington extending north to such places as Longview, Chehalis and Centralia, Washington, and west to Willapa and the Grays Harbor area.

In proposing as a condition to the Northern Lines merger an extension of the Milwaukee's operations to Portland, it was recognized that the Milwaukee would be at a distinct disadvantage in soliciting competitive freight traffic from and to industry on the tracks of the trunk lines serving Portland or the terminal lines and facilities of subsidiary companies they own or control. It is well recognized in the railroad industry, and my experience bears this out, that a shipper, all other things being equal, will generally favor the switching carrier with his competitive business, unless to do so would delay his shipment unreasonably or there was some other tangible advantage in shipping over a competing carrier serving the same station.

Where freight charges are higher or cars are regularly delayed when moving by a competing carrier, the competing line has little chance of participating in competitive traffic.

The Milwaukee will have no industries which it will serve directly at Portland. In many instances it will be required to reach industries through connecting line switching pursuant to the switching carrier's tariffs and in some instances there may even be an intermediate switching carrier. This means that the Milwaukee will be required to absorb their charges for the switching service on competitive traffic

because generally line haul rates of the switching trunk line include switching to on-line industries. Unless the switching carrier's charges to such industries are absorbed, the other line haul carriers are not competitive. Whether these charges are absorbed depends upon the revenue which the line haul carrier retains. Thus, the level of switching charges to be absorbed often affects the level of the line haul rates which the line haul carrier maintains or proposes.

Because of the entrenched position of the present trunk lines at Portland, and particularly the Union Pacific and the Northern Lines, the Milwaukee believes that its best opportunity to offer its service to shippers and to obtain needed additional business in Portland is in the developing area served by Peninsula Terminal Company or to which the latter's lines may be extended. If Union Pacific and the Northern Lines through applicant SP&S can obtain exclusive control of Peninsula, the Milwaukee will be at a real disadvantage in serving the industries which can and will be served by Peninsula's lines. The owning companies can fix the switching charges of Peninsula to be absorbed by the Milwaukee, or paid by the shipper using Milwaukee service if not absorbed and can obtain trackage rights by mutual agreement over Peninsula so that industries served by Peninsula are on-line industries for them. Through their ownership of Peninsula the UP and SP&S will have direct access to the shippers served by Peninsula in the solicitation of freight and Peninsula's service will be tailored to meet the operations and schedules of the owning lines first and other competing connecting lines second.

If the Milwaukee were granted joint and equal ownership of Peninsula and the use of the interchange tracks connect-

ing with Peninsula, the Milwaukee would have equal voice in the charges and service of Peninsula and offer the shippers or receivers served or to be served by Peninsula an equal choice in using the Milwaukee's services to and from Portland.

This proposal of the Milwaukee takes nothing of real importance from the applicants because of the real potential of Peninsula lies in future business from the location of new industry in the industrial area which can be served by Peninsula.

EXHIBIT 56.

STATEMENT OF THOMAS W. DENCH.

My name is Thomas W. Dench. I am supervisor of the Transportation Rates Section of the Public Utility Commissioner of Oregon. I have been a member of the staff of the Oregon Public Utility Commission for approximately twenty years. My work encompasses the regulation of both railroads and motor carriers within Oregon. I am familiar with railroad rates and services from, to and within Oregon. I have participated in numerous proceedings before the Interstate Commerce Commission as a technical witness, joint board member in motor carrier application cases, and as a practitioner representing the state of Oregon.

Portland is presently served by five major railroads. The accompanying sketch map, Exhibit No. 58, shows the railroad lines within the Portland, Oregon, terminal area, the principal yards and points of interchange between them.

The trackage of Peninsula Terminal Company is located in North Portland and is shown on the map in brown. The

line extends from the Portland Union Stockyards on the east to the northeast corner of the Rivergate Industrial area, a distance of approximately 1.5 miles. Total trackage presently operated in switching service amounts to 3.97 miles. The railroad provides switching service to 14 industries in North Portland. This railroad interchanges traffic with Union Pacific Railroad and Spokane, Portland and Seattle Railway at North Portland.

The lines of the Great Northern Railway and Northern Pacific Railway appear as a broken green line. The joint main line of these railroads and that of the Spokane, Portland and Seattle Railway between Vancouver, Washington and Willbridge, Oregon, appears as a broken blue line. The Union Pacific Railroad also operates over this joint line between North Portland, Oregon, and Vancouver, Washington. Other lines of the Spokane, Portland and Seattle Railway (including Oregon Electric Railway trackage) are shown as a solid green line.

The lines of the Union Pacific Railroad appear on the map in red. The joint line of Union Pacific Railroad and the Spokane, Portland and Seattle Railway between the Union Pacific's Barnes Yard and Rivergate appears as a broken blue line. The Union Pacific Railroad, by agreement, performs the physical switching on behalf of both railroads to industries at Rivergate and to Terminal No. 4 of the Portland Commission of Public Docks in St. Johns.

Southern Pacific lines are shown as a solid blue line. Southern Pacific trackage is located in the southern section of the Portland, Oregon Terminal Area. The Portland Traction Company line is represented by a broken red line. It operates in the Southeast Portland area. This short line railroad is jointly owned by Southern Pacific Company and Union Pacific Railroad.

The Portland Terminal Railroad, which is jointly owned by Northern Pacific Railway, Southern Pacific Company and Union Pacific Railroad, appears as a solid orange line. This terminal line serves numerous industries and steamship docks in northwest Portland. All three owning railroads provide in their switching tariff that their line haul rates will apply from or to all tracks of Portland Terminal Railroad irrespective of whether or not the traffic is competitive with other railroads. Both Great Northern Railway and Spokane, Portland and Seattle Railway presently absorb the switching charges of Portland Terminal Railroad on competitive traffic.

Rail switching service in the East Portland area is furnished on Southeast Water Avenue by Portland Traction Company, on Southeast First Avenue by Southern Pacific Company, on Southeast Second Avenue by the Union Pacific Railroad and on Southeast Third Avenue by the Spokane, Portland and Seattle Railway. These lines appear on the map. The Spokane, Portland and Seattle Railway, Southern Pacific Company and Union Pacific Railroad use joint trackage across the Willamette River Bridge between East Portland and the Portland Union Station.

The map also shows the approximate city limits of Portland, Oregon, as broken orange line. The estimated outer switching limits for each line haul carrier serving Portland is shown by a solid black bar. Table 1 of Exhibit No. 57 gives in more detail the approximate switching limits for each railroad. Some of the individual railroad switching zones are bounded by railroad mile post locations, hence these boundaries can only be approximated on the map.

Table No. 2 of Exhibit No. 57 shows the points within the Portland Railroad Terminal Area where carload traffic can be interchanged between railroads under tariffs filed

with the Commission. The major railroad interchange in Portland is located west of the Willamette River adjacent to the Portland Union Station. Railroad cars are interchanged at this point between the Northern Lines (Great Northern Railway, Northern Pacific Railway and Spokane, Portland and Seattle Railway) and Southern Pacific or Union Pacific directly or via the Portland Terminal Railroad. The Portland Terminal Railroad performs switching service to industries in Northwest Portland or interchanges cars between line haul carriers on behalf of its owning railroads, Northern Pacific Railway, Southern Pacific Company and Union Pacific Railroad.

The principal interchange between Southern Pacific Company and Union Pacific by tariff is at East Portland. Southern Pacific Company, however, physically handles cars directly from or to the Union Pacific at Albina yards. Portland Traction Company also interchanges cars with other railroads, Southern Pacific Company, Spokane, Portland and Seattle Railway or Union Pacific Railroad (via Southern Pacific) at East Portland.

The major yard of the Spokane, Portland and Seattle Railway and principal point of interchange between it and Great Northern Railway, Northern Pacific Railway is at Willbridge. The Spokane, Portland & Seattle Railway and Union Pacific Railroad presently interchange cars directly with Peninsula Terminal Company at North Portland. These railroads also interchange cars between each other at North Portland. The Spokane, Portland and Seattle Railway and Union Pacific Railroad also interchange cars on some traffic at the Barnes Yard of Union Pacific in the St. Johns District. In addition, interchange is also provided between the Northern Lines (Great Northern Railway, Northern Pacific Railway and Spokane, Portland and Seattle Railway), as well as between these lines and Union Pacific at Vancouver, Washington.

By tariff provisions the through line haul rates and charges of the Northern Lines and Union Pacific Railroad presently apply to industries served by Peninsula Terminal Company. Southern Pacific Company does not presently interchange traffic with Peninsula Terminal Company but must depend upon the Spokane, Portland and Seattle Railway or Union Pacific to provide switching service between their interchange with Southern Pacific Company at Portland (Union Station) or East Portland and Peninsula Terminal Company interchange at North Portland. Item No. 200 of Southern Pacific Company Freight Tariff 230-K provides that on carload traffic from or to industries located on the tracks of Peninsula Terminal Railway at North Portland to or from points on Southern Pacific or its connections beyond Portland on which Southern Pacific Company receives a line haul, the same rates apply to industries served by Peninsula Terminal Company as apply from or to North Portland on the Union Pacific Railroad or Spokane, Portland and Seattle Railway subject to a through minimum charge of $67.00 per car including X-256 rate increase. Under this tariff item Southern Pacific Company presently absorbs the switching charges of Peninsula Terminal Company on line haul traffic to the extent shown.

Industries located on the Peninsula Terminal Company may or may not be required to pay a switching charge to Union Pacific Railroad or Spokane, Portland and Seattle Railway for the switching movement between the Peninsula Terminal Company (North Portland) and Southern Pacific interchange (East Portland), depending upon whether joint through rates are in effect or the tariffs of Southern Pacific Company elsewhere provide for absorption of these charges. For example, a switching charge would apply on non-competitive traffic originated by Southern Pacific

Company in Oregon eastward to an industry served by Peninsula Terminal Company.

The Interstate Commerce Commission, by order served December 15, 1967, in Finance Docket 21478, "Great Northern Pacific and Burlington Lines, Inc.—Merger, etc.—Great Northern Railway Co., *et al.*" has approved the merger of the Chicago Burlington & Quincy Railway, Great Northern Railway, Northern Pacific Railway and the lease by G. N. P. & B. for ten years of the lines and properties of Spokane, Portland and Seattle Railway subject to conditions. Under these conditions the Chicago, Milwaukee, St. Paul and Pacific Railroad is accorded the right to extend its service to Portland, Oregon, over the lines of the merged company including the use of the present bridge across the Columbia River between North Portland, Oregon and Vancouver, Washington.

As shown on the sketch map, the present interchange track between applicants and Peninsula Terminal Company in North Portland is adjacent to the joint line trackage across the Columbia River. The Milwaukee's request for authority to interchange traffic directly with Peninsula, as a condition to this merger, would not require a substantial grant of additional joint trackage rights.

In addition to the five major railroads serving Portland, approximately 275 certified motor carriers also operate from, to or within Portland. Of the 275 motor carriers, 51 are regular route common carriers of general commodities. The balance of the for hire motor carriers are specialized or irregular route carriers. Of the 51 regular route common carriers 15 are large system carriers having extensive operating rights on the Pacific Coast and operate transcontinentally. These motor carriers can all serve the Rivergate industrial area, since it is located within the Portland, Oregon commercial zone.

Table No. 3 of Exhibit No. 57 shows by area served the regular route highway common carriers of general commodities operating from or to Portland, Oregon. Twenty motor carriers provide local service to points in Oregon within 50 miles of Portland. An additional ten carriers provide service from or to points in western Oregon beyond this distance. Five motor carriers are authorized to serve eastern Oregon.

There are 17 motor carriers operating between Portland and points in western Washington and 6 carriers provide service to eastern Washington, northern Idaho and Montana. Seven system carriers operate between Portland and California points. Thirteen system carriers provide service on transcontinental traffic and four of these also operate to points in Idaho and Utah.

Table 4 of Exhibit No. 57 taken from the annual reports of Peninsula Terminal Company filed with the Public Utility Commissioner of Oregon for the years 1950 through 1966 shows that the number of revenue cars handled declined substantially between 1955 and 1960. The major loss of traffic as shown on Table 5 is due to the decline in livestock business.

The annual total operating revenue of this carrier as shown on Table 4 has ranged from a high of $161,292 in 1956 to a low of $75,949 in 1963. The average revenue per car from switching service has gradually increased from $7.93 per car in 1950 to $27.71 per car in 1966. Total operating revenues include income from demurrage and other miscellaneous services in addition to switching service. The net railway operating income of Peninsula Terminal Company has ranged from $39,253 in 1955 to a deficit of $4,153 in 1962.

The basic data on Table 5 was obtained from Peninsula Terminal Company records under my direction by a member of the Commissioner's staff. It shows the number of cars handled and switching revenues received from both intrastate and interstate commerce.

Since 1960 Table 5 shows that traffic, other than livestock, has remained fairly constant. Livestock traffic has virtually disappeared. Total operating revenues (Table 4) declined between 1960 and 1963 but increased between 1964 and 1966. Operating expenses show no major change between 1961 and 1965 but were up in 1966. Net railway operating income was a deficit in 1962 and 1963 but has improved in the past three years.

The future need for Peninsula Terminal Company's service is closely associated with the development of the Rivergate Industrial Area by the Port of Portland. Witnesses representing the Port of Portland are testifying regarding their plans for the future development of this industrial area and their dependence upon Peninsula to provide future switching service to industries who locate at Rivergate.

Under applicants' proposal Peninsula will continue to be operated as a separate carrier; performing the physical transportation service to industries served by Peninsula with present equipment and by employees of that company. The granting of access to the present or additional interchange tracks with Peninsula by either the Milwaukee Railroad or Southern Pacific Company would provide present and future industries served by Peninsula direct access to all line haul railroads serving Portland.

The Public Utility Commissioner of Oregon favors joint ownership of Peninsula Terminal Company by all line haul railroads serving Portland.

EXHIBIT 57.

* * *

Table 1.

PORTLAND RAILROAD SWITCHING DISTRICTS.

Portland Traction Company—Between interchange tracks with Southern Pacific Company and Spokane, Portland & Seattle Railway on the north and industries located at East Portland to S. E. Cora St.

Portland Terminal Railroad—All trackage.

Peninsula Terminal Company—All Trackage.

Southern Pacific Company

From tracks of Portland Terminal Railroad Company yard on the north to Brooklyn on the south. (To a point 3570 ft. south of mile post 766; including East Portland). Also Portland (Jefferson St. Line) from Jefferson St. Station to S. W. Nebraska St. (Includes Brooklyn, East Portland, Portland (Jefferson St.) and Portland (Park St.) Switching Districts)

Spokane, Portland & Seattle Railway Co.

From tracks on S. E. 3rd Avenue north of Hawthorne Bridge on the south to Linnton on the north (Mile Post 8.37); also from tracks in Northwest Portland to North Portland (Columbia River Bridge, Mile Post 9.31, on the north); also St. Johns and Rivergate. (Includes East Portland, Linnton, East St. Johns, North Portland, Portland, Rivergate and Willbridge Switching Districts)

Union Pacific Railroad Company

From tracks of Portland Terminal Railroad on the west to N. W. 65th Avenue on the Sullivan's Gulch Line; from East Portland Interchange to St. Johns (including Terminal No. 4); from Rivergate and St. Johns to N. E. 35th St. on the Troutdale Line, including North Portland and interchange with Peninsula Terminal Company. (Includes Albina, East Portland, Kenton, North Portland, Portland, Rivergate and St. Johns Switching Districts).

Tariff Authority:

Portland Traction Company, Freight Tariff No. 1, ICC No. 27.

Portland Terminal Railroad Company, Local Freight Tariff No. 37, ICC No. 60.

Southern Pacific Company, Freight Tariff No. 230-K, ICC No. 4960.

Spokane, Portland & Seattle Ry. Co., Freight Tariff 434-Q, ICC No. 768.

Union Pacific Railroad Company, Freight Tariff No. 9000-F, ICC No. 5615.

Table 2.

Points of Railroad Interchange Within Portland, Oregon Railroad Terminal Area

Interchange Point	*Between*	*And*
East Portland	Portland Traction Co.	Great Northern and Northern Pacific (Via S. P. & S.) Spokane, Portland & Seattle Southern Pacific, Union Pacific (Via S. P.)
	Southern Pacific Co.	Spokane, Portland & Seattle Union Pacific
	Spokane, Portland & Seattle Railway	Union Pacific
North Portland	Peninsula Terminal Co.	Spokane, Portland & Seattle Union Pacific
	Union Pacific Railroad	Great Northern Spokane, Portland & Seattle
Portland	Portland Terminal Ry.	Spokane, Portland & Seattle Great Northern Ry.
	Southern Pacific Co. (Via Portland Terminal Railroad)	Great Northern, Northern Pacific, Spokane, Portland & Seattle, Union Pacific
	Union Pacific Railroad (Via Portland Terminal Railroad)	Great Northern, Northern Pacific, Spokane, Portland & Seattle
	Spokane, Portland & Seattle Ry.	Great Northern, Northern Pacific
	Great Northern Ry. (Via Portland Terminal Railroad)	Northern Pacific Ry.
Willbridge	Spokane, Portland & Seattle Ry.	Great Northern, Northern Pacific, Oregon Electric
Linnton	Spokane, Portland & Seattle Ry.	Oregon Electric Ry.

Source: The Official Railway Equipment Register, ICC—RER 366 January, 1968 issue.

* * *

EXHIBIT 58.

Witness: THOMAS W. DENCH.

On the next page is Witness Dench's Map of the Portland Oregon Railroad Terminal Area.

FOLD-OUT IS TOO LARGE TO BE FILMED

EXCERPTS FROM TRANSCRIPT OF TESTIMONY.

* * *

[30] T. E. ROCHFORD

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Devers) Will you state your full name, please? A. T. E. Rochford.

Q. And your address? A. My business address?

Q. Yes, please. A. Portland Union Stockyards, North Portland, Oregon.

* * *

Q. And your occupation? [31] A. I am division president of the Portland Union Stockyards and also president of the Peninsula Terminal Company.

Q. How long have you been president of the Peninsula Terminal? A. Since 1963.

Q. How long have you been divisional president of Portland Union Stockyards? A. Since 1963.

Q. Mr. Rochford, have you prepared some written testimony for use in Finance Docket No. 24679, which is the application of S. P. and S. and the Union Pacific to acquire control of the stock? A. Right.

Q. Have you been present during the course of this hearing so far? A. Yes, sir.

Q. I hand you, Mr. Rochford, a statement which has been identified for the purpose of this hearing as Exhibit 24. Do you have that before you? A. Yes, sir.

Q. Is this the statement to which you just referred? A. Yes, sir.

Q. Are the facts stated in this prepared testimony and the information and the data covered by that statement, are they true and correct to your best knowledge, information, and belief? A. Yes, they are.

* * *

[34] Q. I take it from your Exhibit 24, your testimony in this proceeding, that your company is well satisfied with the selling price that you are receiving for the stock of the Peninsula Terminal, is that correct? A. Yes.

Q. Your company really doesn't care who purchases the Peninsula Terminal, do they, sir? A. Who owns the stock?

Q. Yes, sir. A. Well, I can't visualize any reason why we should.

Q. As long as you get your money you are happy, are you not? A. That's right.

* * *

[38] Q. Will you look down on Page 10 to the last sentence of that first incomplete paragraph at the top where you indicate that Peninsula is neutral where the choice of main line movement is involved? Do you see that, sir? A. Yes, sir.

Q. Isn't it a fact insofar as your company is concerned you are neutral insofar as who should buy your stock so long as you get your price, isn't that a fact? * * * A. Yes.

[39] Q. (By Mr. Wilson) Was any consideration given in arriving at the value, what they paid for the stock, for the strategic value of the Peninsula Terminal in being physically able to serve the Rivergate area? A. The value was arrived at through an appraisal.

Q. Yes, sir. My question is, did that appraisal take into account any factor in the strategic position of the Peninsula Terminal in being able to serve the Rivergate area? A. I don't know that.

Q. Who in your company would know that, sir, in acquiescing to this purchase price? A. I don't know that anyone in my company would, other than the appraisal company.

* * *

[41] CROSS EXAMINATION

* * *

[43] Q. Do you have an agreement with the S. P. and S., Union Pacific, Northern Pacific, and Great Northern covering the joint operation of the North Portland interchange track? A. Yes. I do not have them with me. I am not 100 percent familiar with them.

Q. But you do have them in your possession here in Portland in your office, a copy of that agreement? A. Yes.

Q. You say you have also been a neutral as to the trunk line connecting with the Peninsula Terminal Company. If, for example, the Milwaukee Railroad were operating into Portland at the present time, would you also be neutral with respect to the Milwaukee Railroad? A. Surely.

Q. Pardon? A. Surely.

Q. After you become the manager of it and it is owned by the S. P. and S. and the Union Pacific, would you be required to follow the policies as to the neutrality as between them which would be dictated by the owning lines? [44] A. I can see no reason why or where there would be any field for myself as an operating agent of the owners to be anything but neutral.

Q. As between the two owners? A. As among any one involved.

Q. Would you take your orders and directions from the owning lines as to what your policy would be after they controlled the Peninsula Terminal Company? A. The owning lines?

Q. Yes. A. I would naturally presumably have to, yes, if we were a managing agent.

Q. Then your neutrality would be in favor of the owning lines, would it not?

* * *

A. I would take my orders from the owning lines.

* * *

[51] WILLIAM A. KAVET
was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Weisser) Will you state your name, please? A. My name is William A. Kavet.

* * *

CROSS EXAMINATION

* * *

[56] Q. Would you turn, please, to Page 5 of your Exhibit 25 for identification. I am referring to the last paragraph. In making that statement that the acquisition of Peninsula by the U. P. and the S. P. and S. would best serve the needs of the area for rail transportation, did you take into consideration the development of the Rivergate area? A. Of course I am talking now about the present day.

Q. The answer to my question is no, you did not take the Rivergate area into consideration? A. No.

Q. You did not? A. Did not.

Q. Did you take the interest of the public in transportation into the Rivergate area into consideration? A. I didn't consider the Rivergate area.

Q. Did you consider the public at all as opposed to the interest of the U. P. and the S. P. and S.? A. As to whether they were being served adequately, you mean?

[57] Q. Yes. A. Yes, I did.

Q. Are you telling me that it is your belief that the public is best served by the Southern Pacific not reaching the Peninsula Terminal?

* * *

A. Perhaps instead of "best" it should be "adequate".

Q. (By Mr. Wilson) I am sorry, I didn't hear you. A. "Adequately serves the area".

* * *

Q. In other words, if all the railroads in Portland served [58] the Rivergate area that would be to the public's benefit?

Mr. Weisser: I object to that. It is argumentative.

Exam. Shoup: Overruled.

Q. (By Mr. Wilson) Do you have the question in mind?

(The record was read by the reporter, as follows: "Question: But it would be better served if the S. P. also reached the Peninsula Terminal, wouldn't it?")

Q. (By Mr. Wilson) Would you agree with that statement? A. Yes.

* * *

[60] Q. How many cars a day would you say are interchanged to the Peninsula Terminal Company at North Portland? A. I don't know exactly.

Q. What is the range? [61] A. Oh, ten to twenty.

* * *

Q. That would be in two different deliveries, or is that in and out, would you tell me about it? A. You are talking about delivery only?

Q. I am talking about deliveries, first. A. It could be several at once, and it could be five or six times a day, depending upon the circumstances. Generally there would be four deliveries a day.

Q. By the S. P. and S.? A. And the U. P.

Q. And the U. P.? A. Yes.

Q. Each four, or four by all of them? A. By all of them.

Q. I don't think I understand you. A. Two apiece.

Q. Two apiece? A. Yes.

Q. And there are two pickups a day also? A. Generally it depends on the volume and what have you.

Q. The Union Pacific picks up from Peninsula and takes it down to Albina Yard. Is that how they go? A. Indirectly. They could. There are various ways they [62] could pick it up. There is a Kenton engine. A Kenton engine could pick up and either take the cars to Kenton or hold them at the pass.

Q. Pardon? Where is the pass? A. At the north end of the tunnel along Columbia Boulevard.

Q. They hold them there and separate them out there? A. They could hold them there or take them to Kenton, or take the car to Albina direct.

Q. That is what they pick at at Peninsula? A. Yes.

* * *

Q. Would you have any idea from what yard they make the delivery to the Peninsula Terminal? A. Well, it could, again it could, it very easily could be an engine out of Albina.

Q. What does the S. P. and S. do when they pick up the cars on the interchange? A. The S. P. and S. usually, when they make a pickup, take the cars to Vancouver.

Q. How do they make delivery? A. Uusally an engine from Vancouver or from Portland.

* * *

[66] Q. Isn't this the practice you usually follow, the shipper will call upon the trunk line to furnish him a car and they will arrange with you to spot the car via Peninsula Terminal? A. The shipper calls on the trunk lines.

Q. Yes, for the cars, does he not? A. No, he calls our yard office for a car.

Q. For a car. Does he specify what railroad? A. Yes.

Q. So you call on that railroad to furnish a car? A. Yes.

Q. The Peninsula Terminal Company supplies no car at all? A. That is correct.

* * *

[70] Q. What is the meaning of the second sentence in that paragraph, "The major portion of business handled is between the S. P. and S., G. N., and N. P. for industries located in Zone 6 of the Portland switching district"? A. The 39 per cent for the Peninsula Terminal Company and the other portion is for the Union Pacific industries in Zone 6.

* * *

Q. Other than the Peninsula Terminal business through the North Portland interchange, is all the rest of the business local switching traffic? A. Yes. There is some zone switching from one zone to the other but I don't know if I understand the question.

Q. I am looking at your third sentence. None of this business is through freight or cars being passed? [71] A. right.

Q. Then it is all local business? A. It is all consigned or originates from this area.

* * *

[73] Q. Mr. Kavet, with this small number of 30 cars a day, do you find that the U. P. and the S. P. and S., which you testified handle these cars for the connecting railroads, line haul, do you find they handle their business as efficiently and effectually as they do their own? A. Yes.

* * *

[74] Q. (By Mr. Green) Mr. Kavet, it seems that there was a discussion about your receiving calls about the handling of cars. I don't know who they were for, S. P., N. P., U. P., or who. On the basis of these calls, do you get calls mostly for S. P. business, N. P. business, G. N.

business; or S. P. and S. [75] business, or are they approximately the same? A. I don't know what portion the cars are for.

Q. You must know the destination of the cars or where they are from or where they are going to. Is it the S. P. business that is having this trouble? A. I really don't receive enough calls to make any distinction between them.

* * *

[76] Q. Concerning the complaints about delays in handling, you mentioned that you thought a two- or three-day delay was a real bad delay. Was this answer directed solely to S. P. and S. business? A. No.

Q. This was business in general? A. Yes.

Q. How many times a year would you have a complaint concerning a delay of that nature? [77] A. I guess six to eight a year.

Q. Of those do you know how many would be S. P.? A. No.

Q. Have you ever gotten a response when you have traced an S. P. car that has involved a delay of this nature which would indicate that it was still in the Brooklyn Yard?

* * *

A. Yes.

Q. (By Mr. Weisser) The Brooklyn Yard, is that the yard of Southern Pacific at Portland? A. Yes.

Q. Have you ever been tracing an S. P. car handled through U. P. and gotten an indication that Southern Pacific has failed to designate where the cars are to go? A. Yes, but the Southern Pacific said then they also designated where the cars were to go. There is an argument.

* * *

[78] Exam. Shoup: The Examiner has one question with respect to this 61 per cent. Your statement indicates 39 per cent of the cars interchanged through North Portland as being Peninsula business. Is the balance, the 61 per cent, of the business handled directly by designated carriers serving North Portland?

The Witness: Yes. The others, we are talking about cars interchanging, cars either interchanging S. P. and S., G. N., N. P. to the Union Pacific or to the Peninsula grounds. Cars from the Union Pacific are interchanged Union Pacific to the S. P. and S., G. N., and N. P. and also to the Peninsula Terminal. Now, the 39 per cent are cars off the three roads, S. P. and S., G. N., and N. P. to the P. T., also U. P. to the P. T. These are the 39 per cent.

Exam. Shoup: If there were no Peninsula Terminal Company at all, would the other 61 per cent of the cars be handled directly by these line carriers?

The Witness: Yes.

* * *

[79] N. S. WESTERGARD

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Devers) Will you please state your full name? A. My name is N. S. Westergard.

Q. What is your business address? A. 1112 American Bank Building, Portland, Oregon.

Q. What is your occupation? A. I am vice-president and general manager of the S. P. and S. Railway.

Q. How long have you held that position? A. Since 1960.

Q. Have you been present during the course of this hearing, Mr. Westergard? A. Yes.

Q. Have you prepared for use in this hearing a written statement which has been identified as Exhibit No. 26?

[80] A. Yes, sir.

Q. Are the statements and the information contained in that exhibit accurate, true and correct, to the best of your knowledge and belief? A. Yes.

* * * *

CROSS EXAMINATION

* * *

[87] Q. * * * As an operating man would you be satisfied if you found that it took 24 hours plus to move six miles? A. I wouldn't be satisfied, no.

* * *

[91] Q. Haven't you in your plans made some provision for the potential growth of the Rivergate areas and the use of the Peninsula Terminal as a carrier? A. Not exactly, no. The plans for the development of Rivergate are long range, and I don't believe that there is any hard, fast [92] plans that have been made. We are flexible.

Q. But you certainly realize that changes will definitely have to be made in the Peninsula trackage when the Rivergate area opens up, don't you, sir? A. I believe I said that in my statement.

Q. So you would agree with that? A. Yes.

Q. That would probably include putting an additional interchange tracks, would it not? A. It could.

Q. It could also lead to the owning companies actually operating the Peninsula Terminal, could it not, at some future date? A. That, again, is possible, but unlikely.

Q. Why do you say it is unlikely? A. Even though we improved that property and trackage, I don't visualize

that each one of us, that is, the Union Pacific and the S. P. and S. are going to operate on it.

Q. Why not? A. Well, maybe this is oversimplifying, but I would rather have one engine in there with four cars than I would four engines and one car.

Q. How about a unit train? A. The same thing, the same theory applies.

Q. Wouldn't it be simpler to have the Union Pacific or the S. P. and S. bring the unit train right into the destination? [93] A. Not in the case of Peninsula Terminal, I don't think it would.

Q. Why, because of its physical capabilities, the rate it would have, and that type of thing? A. That is part of it.

Q. You would certainly say that, wouldn't you, sir, if the Rivergate Area were developed? A. We would make studies to determine whether it is economically desirable.

* * *

Q. If your railroad were not an owner of the Peninsula Terminal it would have no voice in the development of the Peninsula Terminal to serve the Rivergate area, isn't that a fact? A. I don't think that is a fact, no.

Q. How would a railroad that is not an owner have any voice in what the Peninsula Terminal decides to do? [94] A. I think the way is always open between railroads to negotiate for some arrangements.

Q. Would the S. P. and S. or the U. P. be willing to negotiate today for the trackage rights of the Southern Pacific to reach the Peninsula Terminal? Is the door open on that? A. They are willing to discuss any proposal that you might offer.

* * *

[95] Q. If we were to work out some transaction where Southern Pacific [96] did work over the trackage of S. P. and S. to reach the Peninsula Terminal Company, would

that be in the public interest in your view? A. I don't feel that it would necessarily, no.

Q. Why not? A. Because I don't see that it is in the public interest to have equipment or locomotives of more companies than are needed to adequately serve the public in an area, operating into an area. It could be detrimental to the public in that it could add to the congestion. Basically, I assume that it is the same traffic that will be handled. I grant this, that as an area grows there will be a growth in traffic, but at any given time you assume there is that traffic going into that area, and to have locomotives of four companies handling it instead of one, to me I don't see that that is in the public interest.

* * *

[102] Q. (By Mr. Ploeger) I am Warren Ploeger of the Milwaukee.

I would like to have you turn to the map attached to your statement on Exhibit No. 26. The green trackage shown on the right of the exhibit is the S. P. and S. N. P. line across the Columbia River from Vancouver? A. Yes.

Q. And that is a double track line? A. Yes, it is.

Q. Then as we get to the center of the map or just past, it shows that the O. W. R. and N. track takes off and that track moves on down to Albina, is that correct? A. Yes.

Q. And also connects with the Union Pacific's east and west main line, is that correct? A. I don't know.

Q. The one that takes off at Head Block, at Station 93 plus 54.2? A. Yes.

Q. And the green line going on beyond is the line to the [103] extent of the S. P. and S. and Northern Pacific extended to Willbridge? A. That is right.

Q. That is on the other side of the Willamette River? A. Yes, sir.

Q. This same green trackage that is shown on here is the trackage that the Milwaukee will be operating under or over if the Northern Pacific, Great Northern and Burlington are merged and they operate the properties of the S. P. and S., is that not true? A. If they choose to do so, yes.

Q. If they choose to exercise that right? A. Yes.

Q. Therefore, if the Milwaukee chooses to exercise these rights, they will be moving over the green trackage all the way through into Willbridge and thence into Hoyt Street Yard at Portland? A. They may.

Q. The Milwaukee trains will be operated by Milwaukee personnel, it is my understanding. Is that your understand? A. That is my understanding, yes.

Q. And the trackage shown in purple on this map which extends from the Head Block, which I believe to be 92 plus 99 shown on the map— A. (Interrupting) Yes.

[104] Q. (Continuing)—extends to a connection with the interchange tract from the S. P. and S. main line, is that correct? A. Yes.

Q. That purple piece of track is owned jointly by the S. P. and L, the N. P., and the O. W. R. and N.? A. Yes.

Q. The yellow trackage is owned jointly by the Peninsula Terminal Company, one half, and the other half owned jointly by the S. P. and S., the N. P. and the O. W. R. and N.? A. Yes.

Q. The outside interchange tracks are owned jointly by the S. P. and S. the N. P., and the O. W. R. and N., is that correct? A. That is right.

Q. That is tracks 1 and 4? A. Their ownership is indicated on this exhibit.

Q. And that is correct? A. Yes.

Q. On that map you show Western Wax Paper. Is that a Crown-Zollerbach operation, too? A. Yes.

Q. You show up there and beyond trackage. You have a spur into the Portland Pole yard. Is that a Crown Zollerbach operation, also? A. Yes.

Q. Does the S. P. and S. or the N. P. have the power to grant to [105] the Milwaukee the operating rights over the purple trackage shown on that map at present? A. I don't know whether they do or not.

Q. You have the agreement covering this trackage? A. Coverage—

Q. (Interrupting) The trackage shown in purple. A. I have read them, yes.

Q. Do you have them with you? A. I believe I do have some of them with me.

Q. Do you have them with you? A. I am not certain just what agreements you are referring to there. There are several agreements covering these tracks.

Q. How many are there and what is the date of them, if you know? A. I think that is listed in our application.

Q. These agreements to which Peninsula Terminal Company is the party? A. I thought that was what you were referring to when you mentioned going up here to Crown Zellerbach.

Q. I wanted to cover these North Portland interchange tracks. Do you have an agreement between the northern lines or the S. P. and S., the Union Pacific and the Peninsula Terminal Company covering the North Portland interchange tracks? A. Yes.

Q. Is that the agreement of August 31, 1938, that is supplement [106] in 1952 and '55? A. Yes.

Q. Then you also have an agreement of 1954, September 7, covering the operation of the yard office? A. Yes.

Q. Do you have an agreement covering 1936, the per diem car hiring arrangement? A. Yes.

Exam. Shoup: We will take a five-minute recess.

(Short recess.)

Exam. Shoup: On the record.

Q. (By Mr. Ploeger) We named off some of the agreements which the Peninsula Terminal Company is a party. Do you have those agreements with you in the hearing room? A. I am not sure I have them all.

Q. Do you have any objection to my looking at those agreements?

Mr. Devers: What was the question?

(Question read.)

Mr. Devers: I will interpose an objection to the question, because I think it may lead to a demand for the agreements, some of the agreements which the Milwaukee was asking for in the subpoena *duces tecum*, which they requested the Commission to issue and which the Commission denied. So when he reaches a point of asking for them, we will object, and I think it would be consistent with the Commission's order.

[107] Mr. Ploeger: I might say that the Examiner has the authority to issue the subpoena, and I might call upon the Examiner for that exercise of authority at the proper time. I am not doing so now. I am just asking if there is any objection to furnishing me with the agreements so we might look at the terms of them which will aid in the examination of this witness. If counsel feels that this is confidential information, I think he can object on that basis, however, they have been referred to in the testimony and they have been referred to in the application.

Mr. Devers: I have made my objection, Mr. Examiner.

Mr. Ploeger: To what are you objecting?

Mr. Devers: I am objecting to the question you put to the witness.

Mr. Ploeger: The question is if the witness has any objection to furnishing the agreements.

Exam. Shoup: The witness may answer the question.

A. I object to furnishing them, yes.

Exam. Shoup: The Examiner isn't going to require the production of those agreements in this proceeding by subpoena or otherwise. The applicants have certain responsibilities and certain standards of proof which must be met.

That is the Examiner's reply to it.

Mr. Ploeger: You are going to rule in advance before I make the request?

[108] Exam. Shoup: Yes, sir, that is the way it goes right now.

Q. (By Mr. Ploeger) Are there also agreements between the S. P. and S., the Union Pacific, the Northern Pacific and the Great Northern for the use of the interchange tracks shown in yellow and purple on this exhibit or map exhibit attached to your Exhibit 26? A. Yes.

Q. Does the Great Northern have trackage rights over that connecting track and the interchange tracks? A. Their rights have been indicated in there, yes.

Q. What does that mean? A. Just what I say, they are accepted as having rights in there.

Q. Does the contract so provide, or any of the contracts? A. I can't recall now.

Q. Do you know what the contract says about these interchange tracks? A. In a general way, but I wouldn't try to detail those agreements from memory.

Q. Has the G. N. ever physically operated on those interchange tracks or that connecting track? A. On rare occasions.

Q. But they have the right to do so? A. They have been in there.

Q. And you figure they have done so under some kind of an [109] agreement? A. Understanding.

Exam. Shoup: Counsel, to what tracks are you referring?

Mr. Ploeger: I am referring to the connecting track that extends from Head Block 93 plus 24 of the green on S. P. and S. main line to the so-called interchange track which I take it would be shown in purple and yellow on this map, and which extends down someplace in the neighborhood of the end of curve station 66 plus 60.8.

Q. (By Mr. Ploeger) Has the N. P. ever operated any engines and equipment other than cars on the interchange tracks? A. Rarely.

Q. But they have an ownership right, is that correct? A. Yes, they have an ownership track.

Q. But the Great Northern does not have an ownership? A. No.

Q. In fact, is it not true that the S. P. and S. under contract with the Northern Pacific and with the Great Northern actually handles with its engines and crews the N. P. and Great Northern cars to the interchange track with Peninsula there? A. Yes.

Q. And also with interchange to the Union Pacific? A. Yes.

Q. That is to avoid the necessity of duplicate engines [110] switching there? A. Yes.

Q. Is that under an operating agreement, also, in writing? A. Yes, the charge that they pay for the service is spelled out in the operating agreement.

Q. Now, Mr. Westergard, if the Milwaukee were operating into Portland over the track in green, what is your understanding as to how the Milwaukee cars will get to the Peninsula Terminal? A. I really don't have any understanding today.

Q. How would you assume, then, or how would you figure out how they would get to Peninsula Terminal, as an operating man? A. I believe you are, as I read the contract and the conditions of the I. C. C. in the merger, that you will ask for the rights that you want, and then we will negotiate, and until I know what you ask for I don't assume how you are going to get it.

Have you seen the agreement between the Milwaukee Railroad and the prinicpals in the Great Northern, Northern Pacific, Burlington merger? A. Yes.

* * *

[111] Q. (By Mr. Ploeger) How do you understand, sir, that the Milwaukee will be delivering cars to Peninsula Terminal Company under the agreement with the northern lines and the Milwaukee? A. I don't have any understanding.

Q. You are not qualified to have come to any conclusion as to how the interchange at Peninsula Terminal will actually take place? A. As I see it, Mr. Ploeger, there is more than one way that it would be possible.

Q. What are some of those ways? A. One way that might be possible is, as I understand your petition, you want to run right down there and deliver them and pick up.

* * *

[112] Q. Could they make any deliveries at the north Portland interchange track if they did not have trackage rights on the track which included the connecting track? A. I would say no.

Q. Nor could they contract with anybody else to perform that kind of service, could they? A. That would take an understanding, also.

Q. Is it your understanding that if the Milwaukee had trackage rights over that interchange trackage and the North Portland interchange tracks, that necessarily would

be so that the Milwaukee would be running engines and cabooses in there with its own crews? A. Not necessarily.

Q. Why did you testify in your amended testimony that it would take additional trackage if the Milwaukee were to make delivery of cars at the North Portland interchange? A. I understood that was what you were petitioning for.

Q. If we petitioned for and got through the Commission the approval of operating rights over the connecting track and interchange track, and then contracted with the northern lines to deliver the cars on those tracks for us under an operating arrangement with their crews, would that cause any additional congestion? A. No.

[113] Q. And it would not require any additional trackage, would it? A. Assuming that it didn't generate any more traffic, it wouldn't require any more trackage.

Q. Is your contention or your belief that the Milwaukee's operations into Portland will bring additional traffic to Portland and the Peninsula Terminal Railroad? A. I don't foresee that it, in itself, is going to make any appreciable increase in the traffic to Peninsula Terminal.

Q. You testified in the northern lines case, did you not, as a witness for the S. P. and S. Railroad, the northern lines merger case? A. No.

Q. You did not testify ? A. No.

Q. But you attended many of the hearings, did you not? A. Yes.

Q. You are fully familiar with the operating plan? A. I have information on it.

Q. And you have in recent months been giving some consideration to how you are going to operate if the merger is ultimately consummated? A. Yes.

Q. In that connection is it not true that there will be less traffic over the line shown in green after the merger than there is now? [114] A. No, I don't believe so.

Q. Is that the intention of the merged company, to handle additional volume of traffic that now moves through Portland by either Klamath Falls or Beaver, California? A. There will be many changes in traffic patterns as a result of the merger. I don't recall that their studies indicated any material decrease in the volume of traffic moving between Willbridge and Vancouver.

Q. Do you see any reason why, as an operating man, the Great Northern, Northern Pacific, Burlington lines could not, acting under a joint arrangement, handle the Milwaukee traffic as an agent of the Milwaukee as its agent to and from the North Portland interchange tracks and over that connecting track if the Milwaukee had trackage rights over there? A. It is physically possible, yes.

Q. Is there any objection that you can think of besides the fact that it is physically possible? A. I don't know how I can say it any differently than what I have said before that there is an objection. The more movements in and out of those tracks, and I am not thinking just of the movement within the trackage, I am thinking of the movements on this green track, every movement, whether it is one car or fifty cars, when they stop they interfere with the other traffic that is moved on the green track. The more movement there is, the more interference there is and the more [115] congestion. It leads to more congestion.

Q. And the more business you have, that also leads to the same thing? A. I say this, even assuming that the business, that the carload traffic, is about the same, but if you are handling it in two or three movements when you could be handling it in one, there are three trains stopped out there instead of one.

Q. Is there any reason why the Great Northern, Northern Pacific and Burlington lines would not handle Milwaukee cars exactly the same way they handle Great Northern and Northern Pacific cars, that is, the S. P. and S. does?

A. I think they are all cars of the same type and class, and there isn't any reason why we couldn't couple onto a Milwaukee car the same as we do a Great Northern and Northern Pacific.

Q. Does the S. P. and S. do switching at Vancouver for all lines including the Union Pacific? A. Yes.

Q. Is it the intention that the S. P. and S. will perform switching at Milwaukee's request to Vancouver on the same basis? A. I assume so.

Q. When the Peninsula Terminal Company first approached the S. P. and S., whom did they approach? A. Individual, you mean?

Q. Yes. [116] A. I might have been the first one, I don't know.

Q. What was their proposal, to sell you the trackage and facilities of the Terminal Company or the stock? A. It wasn't a proposal, it was just a casual conversation.

Q. An inquiry as to whether you were interested? A. Yes.

Q. Who told the Union Pacific that you were thinking of buying the Peninsula Terminal? A. I don't know whether that was Mr. Budd or Mr. Menk or Mr. Macfarlane.

* * *

Q. Did you have any conversation with the Union Pacific about their joint ownership of Peninsula Terminal? [117] A. Yes, we have had conversations.

Q. What reasons did they give you for wanting joint ownership with the S. P. and S. and Peninsula Terminal? A. The reasons that were advanced, as I recall, were that because of this association that we had over the years and that exists even today in our connection into the Peninsula Terminal, that they felt that that same relationship should extend into the ownership of Peninsula Terminal in the event that we acquired that property.

Q. Don't you think that you could operate it, the S. P. and S. could own it and operate it just as well as an independent company or the northern lines without joint ownership with the Union Pacific as if they did have joint ownership with them? A. That was our original intent.

Q. Yes, but the Union Pacific, did they object to you having ownership solely in the S. P. and S.? A. They asked to join with us in acquiring it.

Q. The Peninsula Terminal? A. Yes, sir.

Q. Did they express an opinion to you or anybody in the S. P. and S. that you know of that if they did not have a joint ownership of that company, the Peninsula Terminal, that the Peninsula Terminal would be at a disadvantage with the northern lines on the S. P. and S.? [118] A. Not to my knowledge.

Q. Do you think it would be to the advantage of the S. P. and S. to have sole ownership of the Peninsula Terminal rather than joint ownership? A. I think this, that a single ownership is simpler than two, and two is simpler than three or four. I think it follows.

Q. Why, then, did you agree that the Union Pacific should have joint ownership? A. I didn't make that decision.

Q. You do not know why? A. I think I do. Those that did make the decision saw some justification or some good reason in the Union Pacific's request and they decided to go along with their request.

Q. Did they indicate that if they didn't have joint ownership in the Terminal Company they would petition for ownership? A. Not that I know of.

* * *

[119] Q. North Portland is in the Portland switching district, is it not? A. Yes.

* * *

[120] Q. You could obtain trackage rights from Peninsula Terminal as owning lines, could you not? A. As owners we could obtain trackage rights on Peninsula Terminal?

Q. Yes. A. I would say yes.

* * *

[121] Q. You have an operation now extending from this main track shown in green, but off the map to the left down there where you pass over the Union Pacific's east-west line, do you not? A. Yes.

Q. Then you have a connecting track with the Union Pacific Barn yard? A. Yes.

Q. That is an S. P. and S. connecting track? [122] A. Yes.

Q. Then does the Great Northern and Northern Pacific also have trackage rights over that? A. No.

Q. Just the S. P. and S.? A. Yes.

Q. Does the S. P. and S. have trackage in the Barnes Yard at Union Pacific?

* * *

Q. (By Mr. Ploeger) Do you have trackage in the Barnes Yard? A. By "having", do you mean do we own? [123] Q. Yes, do you have trackage rights on certain tracks in the Union Pacific's Barnes Yard? A. Yes, we pay for the record.

Q. Do you have trackage rights over the tracks of the Union Pacific to Terminal 4? A. Yes.

Q. Do you have trackage rights or do you jointly own, tell me which, trackage extending from Barnes Yard to the Terminal 4 track out to the Rivergate Industrial area now? A. Yes.

Q. Do you own it jointly with Union Pacific? A. Yes.

Q. Has an agreement been reached on that, its use and operation? A. Yes.

* * *

[124] A. The agreement covering the jointly owned trackage extending from the connection between Barnes Yard and the Port of Portland property, that agreement has been executed. That is consummated.

Q. Is that jointly owned track of S. P. and S. and Union Pacific? A. That is right.

Q. Then the trackage beyond that to the Gilmore Street is owned by the Port of Portland? A. They built it.

Q. They own it? A. I assume so.

Q. So the S. P. and S. and Union Pacific already have access to the Rivergate Yard, the industrial area, from the south, do they not? A. Yes.

Q. Of course, Peninsula Terminal will also give them access and control of the entrance of the Rivergate district from the north, is that not true? A. Yes.

Q. In order to get to the S. P. and S. trackage from Barnes Yard to the Rivergate district, the S. P. and S. operates over Union Pacific tracks? A. Just to make a delivery and pickup.

Q. Then you have a joint facility arangement beyond there? [125] A. Yes.

Q. Where the Union Pacific handles S. P. and S. cars for them? A. Yes.

Q. On a per car cost based on the pro rata expense, is that correct? A. Yes; it is a flat rate, but it is based on it.

Q. It is eight dollars a car, isn't it? A. It is eight dollars a car to Terminal 4.

Q. How much a car to Rivergate? A. That is twelve dollars.

* * *

[128] Q. (By Mr. Ploeger) Mr. Westergard, on Page 10 of your testimony you state that in your opinion the growth of the Rivergate will require certain changes in the Peninsula Terminal track in order to serve the Rivergate

area and that you have given consideration to the construction of a new track direct from the S. P. & S. main line to Rivergate and that you have given assurance that you would provide, that the S. P. & S. and the Union Pacific would provide, a joint service similar to that provided in connection with the line via Barnes Yard, is that true? A. Yes, sir.

Q. Of course you had a contract for a long time outstanding, have you not, to serve Terminal 4, that is Municipal Terminal 4 which is south of the Rivergate on the Willamette? A. Yes, we have.

Q. That agreement is the agreement of October 6, 1921? A. I believe that's the date, yes.

Q. That covers the construction of the track from the west side of your main track near Barnes Yard into Barnes Yard, that agreement? [129] A. That track was constructed in order to make that agreement effective, yes.

Q. It also covers the use of two tracks in Barnes Yard of the Union Pacific? A. Yes.

Q. It also covers the operation by S. P. & S. over the track Barnes Yard to Terminal 4? A. Yes.

Q. It also provides, then, in lieu of your actual handling with your engines and crews the handling by U. P. from Barnes Yard to Terminal 4? A. Yes, sir.

Q. That is the one you mentioned would be $8 a car is the charge? A. It's now $8. That agreement has been supplemented several times. The most recent is now of that rate.

Q. And that's $8 a carload or empty or just loaded? A. It's loaded or empty, it's $8 each way.

Q. That contract was supplemented, was it not, in 1967? A. Yes.

Q. In 1967 it made provision for use of your trackage from the west side of your main track near Barnes Yard

into Barnes Yard and the use of the two tracks in Barnes Yard also for the purpose of serving Rivergate, does it not? A. I don't recall whether it's that agreement you are referring [130] to or another one that provides for the use of track in Barnes Yard.

Q. I am talking about your amendment dated May 26, 1967. A. Yes.

Q. And that contract is effective from and after a date in 1963? A. I think that's right, yes.

Q. You have been negotiating for or giving consideration to either constructing your own track or the track from Barnes Yard to the Rivergate Industrial area for several years, have you not? A. Yes.

Q. It's been on the expected development of that area? A. Yes.

Q. Have you made some studies during the same period about extending a track from the west side of your main track in the vicinity of the North Portland Junction into Rivergate? A. Yes, we have made some horseback estimates.

Q. Would that be a new track rather than a Peninsula Terminal Company's? A. One such estimate was based on an entirely new track direct from the S. P. & S. main line.

• • •

[131] Q. You also have entered into a contract, did you not, with the Union Pacific covering the construction and operation of the track from Barnes Yard to the boundary of the Rivergate Industrial District? [132] A. Yes.

Q. What is the date of that contract? A. You mean when was it signed?

Q. Yes. A. It was early in—I think it was around May in 1967.

Q. The same date that you revised the Terminal 4 agreement? A. The same date we executed it, yes.

Q. Do you have a copy of that agreement with you covering the Rivergate extension from Barnes Yard? A. Yes.

Q. Will you please get it out.

[135] Q. (By Mr. Ploeger) Is your answer that Paragraph 9 is the [136] same as in the original contract that you have? A. I think it is.

Mr. Devers: What is the date of the contract?

Q. (By Mr. Ploeger) What is the date of the contract that you are referring to, sir?

Mr. Ploeger: I thought he answered it May 26.

Mr. Devers: You have been handing the contract around.

Q. (By Mr. Ploeger) The date of the contract you have is May 26? A. I don't see any date on the contract that I have.

Q. I am asking if the contract I had is the same as the contract you have before you, it is, is it not? A. Yes.

Q. I would like to have you look at Section 6 of Article I on Page 2 of your contract, and would you compare that with the one I have here in my hand? A. Yes.

Q. Is it not a fact, Mr. Westergard, that Article 9, Section 1 of the contract to which you have reference between the Union Pacific and S. P. & S. provided that if any other, that if the Rivergate Industrial District or any part thereof or any properties of the Rivergate District or the rest of the S. P. & S. main line is served by trackage extending from the S. P. & S. main line the Portland Company, that is the S. P. & S., will be required to admit the Union Pacific to that trackage by joined owner- [137] ship and use thereof on determining substantially as set forth in this agreement of May 26, 1960, to which you are making reference? A. That is the sum and substance of it, yes.

Q. Does it not also provide in Section 6 of Article 1, Page 2 thereof—

Mr. Devers (interrupting): Mr. Examiner, to shorten this, and without waiving any objection that I may make to the efforts to introduce other contracts, I am willing to withdraw any objection to this contract and allow the witness to put it in.

* * *

Q. (By Mr. Ploeger) At any rate, the contract that you are referring to provides that neither the S. P. & S. or the Union Pacific shall, without the consent of the other, admit any other carrier to the trackage extending from Barnes Yard to Rivergate, isn't that true? A. To the jointly owned track that we construct.

Q. Yes. The contract requires that you will not let anybody in on any of the new, on any new construction that may be in the future or upon the existing trackage from Barnes Yard to Rivergate without the consent of the other party, doesn't it? [138] A. That is right.

Q. That's the effect of it? A. Yes.

* * *

Mr. Ploeger: It's probably a matter of interpretation.

Q. (By Mr. Ploeger) Do you interpret that contract also as requiring if the S. P. & S. acquired the Peninsula Terminal Company independently that you would be required under the terms of this agreement to permit the Union Pacific in on the Peninsula Terminal Company? A. This particular agreement, as I said before, when it was initiated I at least never thought in terms of Peninsula Terminal. This provision for an access, if and when it became desirable, was the request and desire of the Port of Portland to assume them of the same sort of service that we

were giving them at the west end of the Rivergate development if and when they saw fit to go to the east end of the development and start in, that they would get the same kind of service from the rails there that they were getting down at the west end. This started earlier, the negotiations commenced, I believe, around 1958, 1959, with the Port of Portland. The provision that is made there that Section 9 is backed up by a letter, a joint letter [139] that was given by the general manager of Union Pacific and the general manager of the S. P. & S. to the president of the Port of Portland.

Q. What you offered the port was to give them the exact same arrangements that you have covering the track from Barnes Yard to Rivergate if a new track was built or acquired from North Portland Junction or someplace in that vicinity? A. It was to assure them that no matter where they initiated the development of this whole big Rivergate area that they could have joint rail service into it.

Q. What do you mean by joint rail service, S. P. & S. and U. P. and nobody else, is that true? A. No, sir; Northern Pacific and Great Northern.

Q. It's true the S. P. & S. is owned jointly by the G. N. and Northern Pacific, it's jointly owned by them? A. They are separate carriers but they jointly own the S. P. & S.

Q. All your contract, the Rivergate extension from Barnes Yard and Terminal 4, provides specifically that S. P. & S. cars will include G. N. and N. P. cars, does it not? A. That is right, but it's the joint service by four trunk lines.

Q. That's right, but what other carriers did you have in mind who might be nonparties to this agreement at the time you drew it in 1967 or executed it? A. I didn't have any in mind

[140] Q. What other carriers could reach either any new tracks or the Barnes Yard to Rivergate trackage at the time you drew this agreement? A. None.

Q. So that you weren't really concerned about any existing carriers in Portland, were you? A. Not in drawing up that contract, no.

Q. Why did you put that provision in there that no nonparty to this agreement shall have operating rights over any of this trackage without the consent of the other if there were not carriers in the area serving it? A. I think it's more or less a standard clause.

Q. You mean it had no purpose at all, somebody put it in there with no purpose at all. A. I imagine some lawyer put it in there.

Q. Of course you knew when the contract was signed, did you not, that the Northern Lines Merger was likely to be approved and it was also likely that the Milwaukee would get the Portland condition if it was approved, don't you think you had that in mind when you discussed that on behalf of the S. P. & S.? A. Yes. The signing was subsequent to the Milwaukee contract.

Q. Yes, it was the Milwaukee contract which you referred to, was it not, in the testimony of Mr. Lawrence was dated in 1966, wasn't it? A. Right.

• • •

[147] Q. (By Mr. Green) Mr. Westergard, I understand the application asks for the right to buy into Terminal Company and the use of those trackages. I believe that has been established. Does the S. P. & S. and the U. P. now have any track rights on the terminal itself? A. No, sir. We would have to have permission and we would have to apply to the Interstate Commerce Commission for such trackage rights and, in fact, if and when we acquire it we would have to apply to the Commission for such rights which we are not doing

• • •

[150] Q. I would like also to direct your attention, Mr. Westergard, to Page 12 of your testimony, the second full paragraph, beginning of the second sentence. "Both the Milwaukee and Southern Pacific can and now do share in traffic originating and terminating at Peninsula industries, and their ownership of an interest in this line will in no way benefit the public. For these reasons it is our position that neither the Milwaukee nor the Southern Pacific should be included as owners of Peninsula or be given trackage rights to reach and/or operate on the properties of Peninsula."

In connection with your reference that ownership would in no way benefit the public, that you also stated that therefore you do not propose that trackage rights offer on the property Peninsula—do I understand correctly that you would consider it not in the interest of the public that there would be access to a Peninsula Terminal Company by more lines than present serve it? A. I am not sure what you mean by access. Do you mean more lines operated or operate on it?

[151] Q. Direct trackage. A. And more lines switch cars to industries located on Peninsula?

Q. Direct connected. A. I still don't know what you mean by direct connection.

Q. At the present time you represented the fact that only two lines presently serve the Peninsula Terminal Company? A. Yes.

Q. Do you mean to say by the paragraph I just read that you would consider it not to the public best interest that additional lines have that direct access? A. I think additional lines do have the access.

Q. How, Mr. Westergard? A. I think the cars of all lines serving Portland can reach Peninsula.

Q. In the same manner that they reach Portland? A. Hauled by locomotives, they are the same in that respect.

Q. But single-line service? A. No, not single-line service.

* * *

[152] Q. You are also familiar with the fact that Rivergate in the North Portland Peninsula area is one of the last remaining areas for existing Portland businesses to expand into? A. Yes, sir.

* * *

[155] REDIRECT EXAMINATION

Q. (By Mr. Devers) Along this line, I think it has been made clear that Southern Pacific now shares in traffic that originates and terminates on the lines of Peninsula Terminal, right? A. Yes.

Q. Is that through its connections? A. Yes.

Q. Does Southern Pacific by the same token share this traffic that originates and terminates in South Rivergate? A. Yes.

Q. And that's through its connections? A. Yes.

Q. And every railroad that reaches Portland can also share in this traffic, can it not, through its connection? A. Yes.

Q. If Milwaukee is permitted to enter into Portland it also [156] will be permitted to reach both North Rivergate and South Rivergate through its connections will it not? A. Yes.

* * *

Q. Reference has been made in cross examination to your statement on Page 10 of your testimony where you say in such event Union Pacific and S. P. & S. have already given the Port written assurance that we will provide joint similar service to that being provided now by another connection in the southwest part of Rivergate.

Mr. Devers: May I have marked for identification a letter dated January 19, 1960, from Union Pacific Railroad and Spokane, Portland and Seattle Railway too, I believe, Mr. Linstead

(Applicant's Exhibit No. 35, Witness Westergard, was marked for identification.)

* * *

Q. (By Mr. Devers) I hand you the document which has been marked for identification as Exhibit No. 35. Is that the written [157] assurance to which you have referred to in your testimony or a copy thereof? A. Yes.

Q. And again the date of that letter? A. January 19, 1960.

Q. This contract that counsel for Milwaukee has been referring to on cross examination, and particularly—strike that—which bore the date of May 26, '67, I believe, was that contract the formalization of the commitments that you gave to the port in that letter? A. In part.

* * *

[158] Q. (By Mr. Devers) Isn't that true, based on your experience as an operating railroad executive, that such a provision which precludes one party to such a contract to permit a nonparty to use those tracks without the consent of the other party is a standard provision in that kind of a track agreement? A. I would say so, and I would certainly want it in any joint agreement.

Q. Would you want it there as an operating man as well as perhaps lay counsel? A. As an operating man.

* * *

[159] RECROSS EXAMINATION

Q. (By Mr. Ploeger) The traffic that the Milwaukee will participate in to and from Rivergate today would be that traffic which was interchanged to the Great Northern-

Northern Pacific at the Twin Cities if it was transcontinental or at Chehalis if it was traffic originating in its Milwaukee local territory west of the Twin Cities, is that correct, or do you know? A. You are speaking of the traffic that the S. P. & S. would handle to Rivergate?

Q. Peninsula Terminal would handle which would be the terminal S. P. & S., Great Northern, and Northern Pacific. A. Yes. Presently, since we do not have a direct interchange with you, why it would come that way.

[160] Q. If the Milwaukee would extend its line to Portland, where would it interchange to the S. P. & S. for delivery, and it's in Portland, for delivery to Peninsula Terminal Company, if it did not have the right to make an interchange at North Portland Junction or Barnes Yard? A. One point would be Vancouver, which is the same point we receive the cars of Northern Pacific and Great Northern that we are going to deliver to Peninsula.

Q. If the Milwaukee were to deliver the cars to you at Vancouver, would it not be necessary to pay to the S. P. & S. or the Northern Lines a division of the free rate the same as they do at Chehalis now? A. Not if you negotiated something else, some other arrangement.

Q. We already established, Mr. Westergard, that before we can negotiate something else you have to have trackage rights to the North Portland interchange. A. Yes.

* * *

[162] Q. It's your testimony that the S. P. & S. could, under a joint facility agreement, handle traffic to Peninsula Terminal Company if the Milwaukee did not have trackage rights from the connecting track to the interchange track at Peninsula? A. I can only answer it this way, Mr. Ploeger, that if you didn't get this cars would get there, like if you had interchange anywhere in the Port-

land area with a merged company, your cars would get there under arrangements like Southern Pacific cars do.

Q. You men we deliver them to you at Portland, downtown Portland interchange points, at Hoyt Street or some such place? A. Deliver them at East St. John's less than a mile away.

Q. Do you have trackage at East St. John's? A. Yes.

Q. Where the cars could be set out? A. Yes.

Q. You would haul them from East St. John's back up to Peninsula Terminal interchange? A. Yes, sir.

* * *

[164] Q. What I am driving at, can the S. P. & S. or the Northern Lines make delivery on the North Portland interchange tracks which are jointly owned with the Union Pacific under an operating agreement with the Milwaukee if the Milwaukee doesn't have trackage rights on those tracks? A. I would say not.

Q. I didn't hear your answer. A. I would say not.

Q. Wouldn't it be much better service, then, if Milwaukee had trackage rights to North Portland interchange, and then delivered the cars under a car puller arrangement to the Northern Line or the S. P. & S. at Vancouver for handling directly to North Portland in both directions? Wouldn't that be the most economical way and most efficient way to do it? A. The complication, as I see it, would then be in Milwaukee receiving cars back from Peninsula.

* * *

[166] Q. This is your objection to our coming into that trackage and it would seem to me you would be agreeable to that. The objection is you don't want our engines and crews in there, isn't that right? A. I guess the answer to this would be that this is something you are asking rights on trackage that we don't have the sole ownership of so—

Q. (Interrupting) That's why we are in the lawsuit.
A. I can't answer if you are asking whether we will or we won't.

* * *

[167] REDIRECT EXAMINATION

Q. (By Mr. Devers) Mr. Westergard, I hand you the exhibit marked for identification as Exhibit 36. Will you please tell us what that is? A. This service to supplement the earlier letter of January 19.

Q. To whom is it addressed? A. This is addressed to the Port of Portland.

Q. And its date? A. The date is May 25, 1960.

Q. And it was written by whom? A. This is also a joint letter from Mr. Wengert, general manager of Union Pacific, and Mr. Albertson, vice-president of the S. P. and S.

* * *

[168] Mr. Ploeger: In these letters you referred to the Ramsey Lake development with Dow Chemical. Is the Ramsey Lake development the Rivergate Industrial District now?

The Witness: It is generally the same. Ramsey Lake is what you may call a portion of what is now the whole general area that is called Rivergate.

Mr. Ploeger: Dow Chemical did not in 1960 locate in the Rivergate area, did it?

The Witness: No.

Mr. Ploeger: Subsequent to that time new industries were located in the area they had picked out for Dow Chemical?

The Witness: No, that isn't quite the fact. The January letter was written when negotiations were being carried on between the Port and Dow, and the

Union Pacific and S. P. and S. made these commitments that they would serve Dow and the Rivergate area. Then when Dow's plans fell through as far as locating in the Rivergate area, the Port requested some further assurance that they could continue negotiating for industries in that area on this same basis that they had offered to do. The 19 January letter was what you might say too specific and [169] referred only to one instance, and that is the purpose of this letter.

Mr. Ploeger: This Exhibit 36?

The Witness: Exhibit 36, yes.

* * *

GEORGE H. BAKER

was sworn and testified as follows:

[170] DIRECT EXAMINATION

Q. (By Mr. Weisser) Will you state your name, sir? A. George H. Baker.

Q. By whom are you employed? A. Union Pacific Railroad Company.

Q. In what capacity? A. General Manager of the Northwest District.

Q. Do you have before you a copy of what has been marked Exhibit 26 in this proceeding, your testimony? A. That is the one of Mr. Westergard.

Q. No. 27, excuse me. A. Yes, sir.

(Exhibit 27 marked for identification.)

Q. This is your prepared statement for this proceeding, is it not? A. Yes, sir.

Q. Are the statements and facts stated therein true and correct to the best of your knowledge and belief? A. They are, sir.

* * *

CROSS EXAMINATION

[172] Q. The Portland Terminal Railroad is owned 40 per cent by Union Pacific, 40 per cent by Northern Pacific, and 20 per cent by Southern Pacific, isn't that true? A. Right.

Q. * * * Will you refer to your own testimony on Page 3. You [173] say, "If S. P. and Milwaukee or either of them are permitted to share an ownership of 3.79 miles of railroad, I believe its management would become difficult and indecisive and that service to the public could suffer." Would you tell me, sir, what you meant by "indecisive"? A. Due to the fact that the Portland Terminal Railroad, due to its limit.

Q. Will you answer my question now? Will you tell me what you meant by "indecisive"? A. Due to the physical characteristics with the physical connection of all lines in there, it could be inadequate to provide the service that the public would require.

Q. You say that its management would be indecisive. Could you tell me what you mean by that, sir? A. Because of the complexity of it with all the lines and managements in there that in my opinion they would not—it would just be in complete harassment.

Q. You are the president of the Portland Terminal Railroad, are you not, sir? A. I am for this year, yes.

Q. Is it your testimony that by virtue of the fact that that railroad is owned by three carriers rather than two that its management is indecisive? A. I would say that we do have differences of opinions of various kinds in connection with the management of the Terminal [174] Railroad.

Q. Has that resulted in indecisive management? A. Somewhat; it has happened.

Q. Has it resulted in indecisive management, in your opinion? A. I would say to a degree.

Q. Has that resulted in bad service to the public by the Portland Terminal Railroad? A. I don't believe that it would be, the service would not be affected, physical service to its customers.

Q. But you do think that if the Peninsula Terminal is owned by three rather than two that that would result in service to the public being not as good, isn't that right? A. If three or four physical lines actually performed actual physical operations.

Q. In other words, this statement you make here assumes that both the S. P. and Milwaukee will be physically operating over the Peninsula Terminal, is that what you are saying? A. Yes, I would agree.

Q. Will you read that sentence again that I quoted to you. Doesn't that refer only to ownership? It has nothing to do with operations, does it? A. It refers to management.

Q. You told me that three railroads owning the Portland Terminal Company Railroad rather than two has not resulted in bad service to the public. Will you please tell me, sir, [175] why ownership of the Peninsula Terminal by three railroads rather than two will result in a decline of service to the public?

* * *

A. There again I have reference to the physical operation and service that is performed.

* * *

Q. Are you telling me, then, that the statement that I have read to you about management which refers only to

ownership there will be no decline in the service to the public if three or four rather than two own it? Do I correctly understand you now? A. It is my opinion that there could be, due to the fact that three or two of them can negotiate and get together where maybe four would be at odd ends.

* * *

Q. You have indicated to me, sir, that the three railroads [176] owning the Portland Terminal Railroad, of which you are president, has not resulted in bad service to the public, and all I am trying to find out is what is the difference in the situation at Peninsula Terminal which leads you to believe that if three railroads rather than two owned Peninsula Terminal the service to the public could suffer, to use your own words. A. I don't think I said that the service to the public would suffer.

Q. That is what your statement says. I am reading it, "and that service to the public could suffer". I am quoting it, sir. A. But didn't I clarify that to the degree that I had reference to the physical operation of the lines' service?

Q. All right, that is all. I wanted to make clear that we have a meeting of the minds that the fact that there are ownership by three railroads rather than two will not result in a decline of service to the public, it is only when you reach the point that the railroads are physically operating over Peninsula Terminal that that takes place, is that right? A. To a degree, with the exception that when we get into track contracts and anything with an industry going in there, I think maybe we could run into opposition as to whether there are more and better groups.

* * *

[177] Q. Mr. Baker, isn't it a fact that the only reason the Union Pacific seeks to control the Peninsula Terminal is to block the other railroads serving Portland from reaching Rivergate? A. No.

Q. If your answer is no, why do you object to the Southern Pacific having direct access to the Rivergate area? A. Because there will be congestion.

Q. This congestion is the sole reason that Union Pacific objects to Southern Pacific having direct access to Peninsula Terminal, is that correct? A. We have trouble getting to our own yard with our own physical transportation.

* * *

[178] Q. Let's go back. I asked you the question whether wasn't it a fact that the reason the Union Pacific seeks to control the Peninsula Terminal is to block the other railroads from having access to the Rivergate area. You said no, that is not the fact. A. They have access.

Q. Direct access, Mr. Baker. You know what I am referring to. Direct connection with Peninsula Terminal. Isn't that a fact? A. Physically direct.

Q. Your answer is no, that is not the motive of the Union Pacific, isn't that a fact? A. No, because they do have access to it now.

Q. If your answer is no, that is not the motive of the Union Pacific in seeking to control Peninsula Terminal, my question is, the sole reason that you do not want Southern Pacific to physically operate the Peninsula Terminal and connect with them directly is because of the congestion on the Union Pacific line between Albina and North Portland? A. Yes, sir.

Q. That is the sole reason? [179] A. Right.

* * *

[181] Q. You say a little further down on that same page that S. P. service can be continued in this same manner under applicant's control of Peninsula. Is it your view that the service that the Union Pacific has been performing for the Southern Pacific in bridging the traffic from Albina to the North Portland interchange has been adequate? A. I would say it is adequate, yes, normally, yes.

Q. What do you consider an adequate elapsed time for a movement of, what did you say, 5.2 miles from Albina to the North Portland interchange track? As an operating man, what do you consider adequate? A. If I took an engine and operated right directly with one car, for example, to the Peninsula Terminal Railroad, to the interchange track, this would make this one movement, approximately one hour.

Q. What has been the service that you have been providing to [182] the Southern Pacific for those moves? A. Well, I can't—I think on an average of maybe 30 hours at times. The same way with our own traffic.

Q. Thirty hours. What have you done about that? A. First, should we go back and take a look at maybe how this traffic, how it is handled out there?

Q. Let's talk about your own traffic. You said your own traffic had those 30 hours' delays too. What is causing that? A. From the time it arrives until it is in the yard, by the time it is serviced indirect, from the time it is switched into the transfer cut going out there, and from the time the actual physical interchange is made, and your traffic is handled right in the same manner.

Q. As an operating man, sir, do you consider that as adequate service, 30 hours from the time of arrival until it is spotted in the switching area? A. Let's put it this way, I haven't received any specific complaints.

Q. So if you haven't received any complaints and you know it is taking 30 hours, that is adequate service for the Union Pacific, is that right? A. I wouldn't say that.

Q. You haven't done anything about it, have you? A. However, we haven't received any complaints, to my knowledge.

[183] Q. The operation today, if traffic is destined to the Peninsula Terminal moving via Southern Pacific, it is given to the Union Pacific at the Albina Yards? A. Yes, sir.

Q. Physically? A. Yes.

Q. The Southern Pacific operates from East Portland to Albina Yards as your agent, does it not? A. That is right.

Q. At Albina the Union Pacific then takes that traffic and moves it to the Peninsula Terminal-North Portland interchange, is that correct? A. Yes.

Q. How is that traffic handled by the Union Pacific to Albina at the North Portland interchange? A. Normally with a Kenton engine, what we call a Kenton Yard engine, on the 11 p. m. to 7 a. m. yard engine and again on the 7 a. m. to 3 p. m. yard engine. There will be times if there is a call, it is my understanding, about any particular car that after the Kenton Yard engine gets to Penn Junction, then it will go on over to North Portland to make the interchange there with the Peninsula Railroad, return, and then grab its cars and continue on to Kenton. However, if there is no rush cars, then the movement will be from Penn Junction up to Kenton. Then when it returns after doing its work in the [184] vicinity of Kenton, then it comes down and out to the Peninsula Railroad interchange track, makes it delivery and its pickup, and then back into Albina Yard.

* * *

Q. I would like to talk a bit, Mr. Baker, about the Union Pacific trackage between your Albina Yard and the North Portland interchange with Peninsula Terminal. Will you tell me what the weight of the rail is, sir? A. That is 131-pound rail.

Q. That is main line rail, isn't it? A. Yes.

Q. It can handle any kind of traffic, can't it? A. Yes.

Q. It is a first class railroad? A. Yes.

Q. Well ballasted? A. Yes.

Q. Ties are in good shape? [185] A. Yes, sir.

Q. How about the curvature? A. Curvature is no problem in that area.

Q. Will you describe the signalling on that line from the time you leave Albina Yard until the time you arrive at Peninsula Terminal? A. That is CTC, central line traffic control signalling, which is controlled by the train dispatcher in the Albina Yard or Albina chief dispatcher's office, with the starting signal commencing at St. John's Junction, continues on through what we call the tunnel, which is a mile long, to Peninsula Junction. There the railroad makes what we call "H" line, makes a diversion of continuing on toward either North Portland, Kenton, or Barnes. CTC terminates at the Peninsula Junction.

* * *

[187] Q. How many main tracks do you have? A. We have what we call a main track. We have, after the remodeling of the Albina Yard, what we refer to as the old main, but which is used as yard trackage.

Q. You say you are remodeling Albina Yard? A. I said when Albina Yard was remodeled here a few years back.

[188] Q. Is Albina Yard a sufficient yard, in your view? A. Yes, to the degree of what we have to work with and capacity.

Q. On traffic that moves through Albina Yard without stopping for any switching or classification, which tracks do you use to move through that yard? A. We actually don't have any traffic that will actually make a move—strike that, will you.

For example, with a forwarder train, he could be yarded at any track in Albina Yard that would accommodate him, which we classify as our longer tracks, which is sometimes set toward the middle of the yard and then continues its movement on out.

* * *

Q. How many tracks do you have in Albina Yard? A. I could be—I would rather not—I estimate around 42 to 44.

* * *

[189] Q. How long is Albina Yard from one end to the other? A. I would say approximately a mile and a half, three-quarters.

Q. Do you have a hump at Albina? A. No, sir.

* * *

[191] Q. Didn't you hear Mr. Westergard's testimony, which you told me you agreed in, that all of the trackage would be connected at Rivergate? A. In years to come, but I do believe that in some of the reports it did show that there would be a separation, a water separation, over somewhere in this general area (indicating).

Q. Then you disagree with Mr. Westergard that all of the tracks in Rivergate will be connected? A. In years to come it is our understanding they will be connected, but with the immediate future we just don't know where this is or where it is at.

* * *

[192] Q. You want to develop the Rivergate area, do you not? A. However, that has nothing to do with the Peninsula Railroad, only just in a short immediate area that I understand may develop in the near future. My understanding of the development of Rivergate will be a track that will take off of the S. P. and S. joint track along the top of the dike or levee and into the Rivergate industrial area.

Q. And if no other railroad other than the U. P. and S. P. and S. have direct access to Peninsula Terminal, they will be forever blocked from reaching the Rivergate area, will they not?

* * *

A. No, they won't, because you have rights into this general area up there now.

Q. (By Mr. Wilson) Are you telling me, Mr. Baker, that the [193] Southern Pacific can operate into the Peninsula Terminal interchange tracks today? A. You joined with us on the rates.

Q. I am asking you whether the Southern Pacific can operate in the North Portland interchange today. A. Physically?

Q. Of course, that is what I am asking. A. No.

Q. If they can't operate up there, how can they serve the Rivergate area except through the Union Pacific? A. That is the way you serve it now.

* * *

Q. Is it your belief that the development of the Rivergate area depends on adequate railroad service? A. Absolutely.

* * *

[194] Q. Is there any double track between Albina and North Portland interchange or is that all single track? A. That is single track.

Q. How about the grades, Mr. Baker? I don't think you gave me that when I asked you as to the physical characteristics of [195] line. A. Well, there is a line grade leaving the Albina Yard up into the tunnel and about in the center of the tunnel there is five-tenths extending and then crest, and then practically level, making a slight extending and upgrade into North Portland.

Q. That, of course, is not an operating obstacle in any way? A. Not to any great degree. I might clarify this. With big heavy transfer trucks trying to use it, it does present its problems, like if they are stalled in the tunnel and you lose compression because of it.

* * *

[196] Q. Let's look at Exhibit 37 for identification: Can you tell me, Mr. Baker, how many moves you make daily over the line from Barnes Yard towards Kenton that would cross the Peninsula Junction? When I say moves, I am referring to whether it be trains, cuts, switch moves, anything of that nature, any kind of a move. A. I don't believe I could actually tell you how many moves there are from Barnes Yard to Kenton.

Q. Or beyond, Kenton or beyond? A. But in that general area it is estimated 40 to 45 moves.

* * *

[197] Q. Yes. Let's talk about that, then. Let's find out how many moves there are that are involved here. How many moves do you have from Albina or south-north through the Peninsula Junction to the North Portland interchange? A. I don't have them broken down as far as that. I just took the grand total of the moves into this area. The CTC graphs ran on an average of 40 to 45 moves per day with as high as 56 moves.

* * *

[200] Q. (By Mr. Wilson) October 1 through 14, 1967, will you please read the total moves per day? A. October 1, 30; October 2, 32; October 3, 45; October 4, 54; October 5, 56; October 6, 44; October 7, 36; October 8, 28; October 9, 30; October 10, 44; October 11, 46; October 12, 43; [201] October 13, 40; October 14, 34.

Q. Will you please do the same thing for the second group of dates you took, which I think was January of this year? A. January 14, 25; January 15, 46; January 16, 43; January 17, 42; January 18, 41; January 19, 41; January 20, 30; January 21, 26; January 22, 35; January 23, 35; January 24, 44; January 25, 43; January 26, 42; January 27, 32.

Q. On the first group that you gave me they range all the way from 28 movements up to 56 in a 24-hour period, is that correct? That is what I took down. The record will show. The second group, they range all the way from 25 movements up to 46. Does that indicate to you, Mr. Baker, that there is room on this track for additional traffic when you have such fluctuations? Isn't that a fact? A. Not necessarily.

Q. Are you telling me it is just as congested on a day when you have 25 moves as on a day when you have 56? A. Of course, anyone knows that if you have 56 it is going to be more congested than on the day you have 28.

Q. Yes. How many movements did you visualize the Southern Pacific was going to make over that line if they were successful in this proceeding on a daily basis? A. I wouldn't have any way of knowing just what they did have in mind.

Q. In preparing your testimony, where you talk about the fact [202] you can't have them on because of this congestion, what did you have in mind when you wrote that? A. The line is heavily congested now handling our own traffic.

Q. Did you have in mind when you wrote your testimony that the Southern Pacific move would be a movement that would move straight through the Peninsula Junction in both directions? A. I don't know what they have in mind. Nobody has given me any indication what they have in mind, whether they want to come over with their own transfers, come to Albina Yard and continue on, or whether this was going to represent transfers to and from.

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[204] Q. (By Mr. Wilson) Look again at Page 20 of the application. I am referring now to the last paragraph. You say, "Within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of the said Rivergate industrial area by the Port of Portland Commission." What are the Union Pacific's projections of this future new traffic that you have referred to in your application? A. I myself have not been apprised of any mammoth development of the Rivergate industrial area off of the Peninsula Terminal.

Q. Would you disagree with this statement? A. No. We do anticipate, just like any other development of any area, that it is going to grow just like it continues to grow with Portland.

Q. So you agree that there will be substantial new traffic from the Rivergate industrial area, is that right? A. There should be.

Q. Did I understand your previous answer to indicate that when Union Pacific used the words "Rivergate industrial area" in their application they were referring only to that area that was immediately adjacent to Peninsula Terminal? A. They could be, or it could have been, too, with the anticipation, maybe, with the assistance of the Port the continued development of the Peninsula Railroad in some manner beyond the Port of Portland's property line.

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[207] Q. (By Mr. Wilson) * * * If there were other railroads connecting with the Peninsula Terminal directly besides the S. P. and S. and U. P., would it be adverse to the public interest to not allow them to be equal owners of Peninsula Terminal? A. Would not be adverse?

Q. Would it be adverse to the public interest to not allow them to be equal owners of Peninsula Terminal? A. No, if they had a track and rights in there, unless they decided they didn't want to be a party.

Q. If a railroad did connect directly with Peninsula Terminal and they were not or did not become an equal owner, they would have no voice at all in what Peninsula Terminal did as far as developing any portion of Peninsula Terminal or beyond, would they? A. That is something I couldn't answer.

Q. Don't you certainly expect that if you are successful in your application here that the S. P. and S. and Union Pacific [208] are going to run and control what the Peninsula Terminal does? A. Well, I think this, that as far as operation is, sure, it would be to the benefit of the public right there at the Peninsula in connection with what the Peninsula Railroad does.

Q. If the record should show that the public desires that all railroads serving Portland reach the Peninsula Railroad, would you, under what you have just told me, for the benefit of the public be willing to give access to other railroads to reach Peninsula Terminal? A. No.

Q. Why not? Because you might lose traffic? A. No, because it would jeopardize traffic to be delivered, it would jeopardize the public because of the congestion that it could cause out there.

Q. Out where? A. At Peninsula Junction.

Q. You can go down through Barnes Yard if you wanted to reach Rivergate. A. Barnes Yard won't be the only place here.

Q. It would be an access to Rivergate, would it not? A. Counsel, you misunderstand me. Are we talking about the Peninsula Railroad over here (indicating)?

Q. Yes, access to the Rivergate area. If you will agree with me that it is the position of the Union Pacific that Peninsula Terminal Railroad is not access to the Rivergate area, we [209] might be able to just terminate this pretty quickly. A. We don't know what is going to develop, as far as that goes, from the Peninsula Terminal. We do not know what is going to develop from the Peninsula.

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[211] Mr. Wilson

GEORGE H. BAKER

resumed his testimony as follows:

CROSS EXAMINATION (Continued)

Q. (By Mr. Wilson) Mr. Baker, am I correct that if you had a clear track under the CTC between Albina and the North Portland interchange that it would take about 30 minutes to make that move? A. From the extreme north end of Albina Yard to the North Portland Peninsula Junction.

Q. Not Peninsula Junction North Portland Interchange with Peninsula Terminal? A. Yes.

Q. Assuming the track is clear and you have no opposing moves, and the CTC is operating, and just moves right on through, would it take about 30 minutes? A. Well, if you had the sufficient power and the train wasn't too long, taking those all into consideration, we estimate right around 45 minutes with just an ordinary engine movement and maybe three, four cars.

Q. I think you told me that is a little over five miles. A. Five and two tenths.

Q. Have you made any study to determine how many times during any 24-hour period that track is open without any obstructions on it by other track for thirty to forty minute period? [212] A. Yes, there has been a study made.

Q. Can you tell me what that study shows as to how many periods in the 24-hour period you might find that track is free and clear? A. In excess of 30 minutes?

Q. In excess of 30 minutes. A. That was in the same study that was made in October and January of this year?

Q. Yes. A. Do you want me to read them by days?

Q. If you will just give me the ones that are 30 or more first maybe we could shorten it down first, 30 minutes or more the track was free and unobstructed. A. For example, on January 26 there was seven times.

Q. Seven times, all right. Can you just do that for each date, sir? A. We can start down here at January 14, 11 times; January 15, 7 times; January 16, 7 times; January 17, 8 times; January 18, 8 times; January 19, 9 times; January 20, 9 times; January 21, which was a Sunday 11 times; January 22, Monday, 7 times; January 23, Tuesday, 6 times; January 24, 10 times; January 25, 6 times, January 26, 7 times; January 27, 8 times.

Q. Would you mind doing the same thing for the other two-week period that you studied? A. October 1 to October 14, '67; October 1, Sunday, 9 times; [213] October 2, 9 times; October 3, 11 times; October 4, 5 times; October 5, 6 times; October 6, 7 times; October 7, 9 times; October 8, which was a Sunday, 9 times; October 9, 8 times; October 10, 5 times; October 11, 4 times; October 12, 4 times; October 13, 6 times; October 14, 5 times.

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CROSS EXAMINATION

Q. (By Mr. Merrill) Mr. Baker, my name is Merrill and I represent the Milwaukee Railroad.

My understanding of your testimony this morning was that you do not oppose access by other railroads to North Portland Interchange because of the fear of diversion of traffic by those railroads by the Union Pacific, is that correct, sir? A. Did I say diversion of traffic?

Q. Loss of traffic. A. I thought, it was my understanding that I did not object as long as the S.P. and S. is a switching agent for them or Union Pacific switches also in conjunction with the switching agent with the Southern Pacific handle the traffic to and from. What I am trying to say is to get away from the heavy congestion of train and engine movement on this single line or at Peninsula Junction.

Q. Which single line are you referring to, Mr. Baker? A. Either on our line getting out, well, it would be this [214] line here (indicating).

Q. You are referring to the Union Pacific line from Albina Yard up to the North Portland Interchange, is that right, sir? A. Yes.

Q. If there were no congestion on that track you would have no objection to granting access to the North Portland Interchange to other railroads, is that right, sir? A. I couldn't quite state that I would have no objection until after I knew what stipulations they were going to come under.

Q. Your objection up to here is the problem of congestion on the Union Pacific? A. Right.

Q. Under the proposed access by the Milwaukee Road to the North Portland Interchange there would be no congestion of the U.P. at Peninsula Junction, is that right, sir? A. There too again, I don't know how, if the merger

were granted just what stipulation the Milwaukee would be coming in there on. You answer me this, would the Milwaukee come up here if they was granted coming across the bridge, would they stop out here and physically set up cars there?

Exam. Shoup: The record isn't clear as to your directions on the map before you, sir.

Mr. Weisser: Could you explain what you meant, Mr. Baker, when you pointed to the Exhibit 4 to the application?

The Witness: If the Milwaukee were allowed to enter Port- [215] land, would this be their route from Vancouver across the Columbia River and Oregon Slough, and on the S.P.&S. mainline, and then make a physical set out down on these tracks, or would S.P.&S. do it?

Mr. Weisser: When you say "these tracks", do you mean the North Portland Interchange Yard?

The Witness: Yes, the North Portland Interchange Yard.

Q. (By Mr. Merrill) Let us work on two assumptions. Mr. Baker, let us assume first, the Milwaukee will make on the S.P.&S. and at this time set out and pick up, would this in any way cause congestion at the Union Pacific line at Peninsula Junction? A. It could very much so while they were occupying the crossovers and the trackage to get in there which would hinder movements from Union Pacific onto the northern routes towards Vancouver.

Q. How many trains a day do you have going from Albina up to Vancouver? A. We have, it would be five, possibly six that would be headed on a northern movement, the same way on a southern movement. Coming from there that would be blocked entering the Union Pacific main track at the point here (indicating) where it divides

off the S.P.&S. main track here, if there were trains standing here blocking or the train was occupying the crossover.

Q. If the Milwaukee were to stop south of the turn off of the [216] Union Pacific trains that would then cause you no problem, would it? A. If we had access and cleared the interblocking plants from North Portland Junction onto the S.P.&S. main track where we operate our trains over going northbound.

Q. By simply looking at the Milwaukee schedule, it is operating down there at different times then the Union Pacific is operating its trains, there would be no problem for the Union Pacific, would there? A. They could probably work it in there on time schedules.

Q. As an alternative move, if we had the S.P.&S. handle our cars from Vancouver the same as they handle the Great Northern and Northern Pacific, that would offer no problem at all to the Union Pacific, isn't that true? A. Well, there we go again. Until I know what they are going to do, if they are going to be using the joint tracks of which the Union Pacific has its rights in connection with the S.P.&S. and under what agreements they are going to use these under before I could give you a definite answer.

Q. Does the present operation of S.P.&S. handling their cars, the Great Northern cars, and the Northern Pacific cars cause the Union Pacific any great headaches in their operations? A. Sometimes we both have them.

Q. Sometimes? A. You bet we do have congestion over here.

[217] Q. This is a natural operating condition? A. Right.

Q. If you put two or three cars of the Milwaukee this would cut the cars from Vancouver in a S.P.&S. train which comes down this interchange at North Portland that would

make no difference that I can see, and I ask you if you can see whether it would make any difference to the Union Pacific. A. On the physical movement, no.

Q. I see. As a matter of fact, isn't your objection to the Milwaukee gaining access to North Portland Terminal Interchange part of an overall effort on the part of the Union Pacific to stop the Milwaukee from reaching Portland and to offer a competitive service, on-line service to any Portland industry, isn't that true, sir? A. We do join with U.N. through rates I believe at Chehalis and Marengo, probably Tacoma.

Mr. Merrill: Mr. Examiner, may I have the question read back to the witness and request an answer.

(Question read.)

A. I would say yes.

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[225] Q. You refer on page 3 of your statement, sir, to unnecessary duplication of service personnel, facilities, and equipment, at the end of the first paragraph on that page. Should the Milwaukee have access to North Portland Interchange and deliver cars there, what duplication of equipment would be required in making an interchange with either the Union Pacific [226] The Southern Pacific, the S. P. & S., or the Peninsula Terminal at that location? A. Peninsula Railroad doing the work that additional cars or equipment would be necessary.

Q. With the Milwaukee making a direct interchange at that point what additional equipment would be necessary, sir? A. Would you clarify the word equipment? What are we talking in line of equipment? Are you talking about rolling stock?

Q. I tried to stay with your terminology, Mr. Baker, and the comments as you set it forth on page 3 of Exhibit 27 are as follows: "Our joint ownership of Peninsula Ter-

minal likewise assure acceptable terminal service to industries located in those parts of Rivergate Industrial District which are or could be served from existing Peninsula trackage without unnecessary duplication of service, personnel facilities, or equipment." When you speak of duplication of service, personnel facilities, or equipment you are thinking in terms of more than one railroad operating over the Peninsula Terminal trackage to reach these industries, is that correct, sir? A. That is right; as well as using those interchange tracks.

Q. We can divide these into two parts, first of all if more than one railroad operates over the Peninsula Terminal to serve these industries this would require duplication of service equipment, personnel, and facilities, is that right, sir?

Mr. Weisser: Mr. Examiner, I think that that question was [227] premised on something that is outside the application in these proceedings except possibly the application of S. P. under their first finance docket. As I read the application none of the carriers except S. P. wanted any users rights over Peninsula Terminal.

Mr. Merrill: If counsel is willing to stipulate Milwaukee's application will not require unnecessary personnel or equipment, I have no further interest in asking any questions of this witness.

Exam. Shoup: The objection is overruled.

Mr. Merrill: Would the counsel be willing to stipulate?

Mr. Weisser: I will not stipulate.

Q. (By Mr. Merrill) All right, Mr. Witness, proceed. A. In regard to interchange track you will actually be making the physical switch yourself out there. We feel you will have to have more interchange track.

Q. What would it consist of, one additional track of the Milwaukee to receive cars? A. As well as maybe additional track to set out cars on.

Q. You already have a track on which you receive cars at North Portland? A. Right.

Q. And the S. P. & S. has track? A. Right.

Q. And the Peninsula Terminal has a track? [228] A. Right.

Q. You have a track you keep open to run back and forth on? A. Yes.

Q. If the Milwaukee came in, is there room to put another track for the Milwaukee? A. I can't say.

Q. Haven't you ever looked at it, Mr. Baker? A. Yes.

Q. Isn't there a lot of room out there? A. What length of track and stuff, but I would want to consult an engineer on it.

Q. As far as you know there would be no problem. A. What do you mean?

Q. Of putting another track. A. I couldn't answer you that truthfully until I had an engineer with me to look it over.

Q. So as to what additional facilities would be required if the Milwaukee operated in there you could not say.

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[229] Q. (By Mr. Merrill) Are there any other facilities you know of that would be required? A. Might have to be some other changes down in the Peninsula Junction, or that is the Peninsula Railroad itself. There is some sharp curvature, what type of equipment you try to place in there I couldn't say until I knew what the problem was going to be at the time.

Q. Let us assume, as your counsel pointed out, that the application of the Milwaukee does not contemplate physical operation on the Peninsula Terminal Railroad by the Mil-

waukee, if that is true then your last answer would not be responsive, would it?

Mr. Weisser: There is equipment other than locomotives, Mr. Merrill.

Mr. Merrill: I would be happy to hear what new facilities other than possibly additional track if the Milwaukee were permitted to reach the interchange at North Portland but not to operate over the track of Peninsula Terminal to reach the industries.

Q. (By Mr. Merrill) Do you know of any other facilities re- [230] quired except one additional track? A. I don't know if one would do it or two. That is something else. In regard to maybe having interchange clerks it all depends on what type of work you want. What is going to be performed out there. If these clerks required additional buildings.

Q. Mr. Baker, have you made any investigation or study to determine this? A. Other than we know of that, more lines come in that we know that it will probably require additional facilities or additional trackage.

Q. Are you in a position to state what additional facilities or what additional trackage would be necessary? A. Not to actually pinpoint it down, no.

Q. This is something you haven't given any detailed consideration? A. We know generally, not it exact, how many feet of space or this or that.

Q. If the Milwaukee is agreeable to bearing the additional expense of building a track in there, if a track is necessary, or to bear the expense for any additional employees, or any facilities this would be no harm or disadvantage then to the Union Pacific, would it? A. If the Milwaukee were allowed into, if that was stipulated in the merger agreement.

[231] Q. Then there would be no injury to the Union Pacific, is that right, sir? A. I think that would be injury to the Union Pacific, yes.

Q. There would be no expense to the Union Pacific if the Milwaukee bore it own expense. A. You are talking just about the physical building of trackage, stuff like that, no, if you bear all expenses.

Q. As a matter of fact, if the Milwaukee bore a portion of expense or whatever the joint expenses are at that point it would possible reduce the Union Pacific expenses, would it not? A. Just in regards to the physical outlay.

Q. Yes.

Now, sir, is there any point in Portland where the Union Pacific and the Milwaukee could make a direct interchange if the Milwaukee service is extended to the city of Portland, of which you have any knowledge, without the use of any intermediate carrier or switching line?

You are aware, sir, before you answer the question, and this may be helpful to you, that under the agreement between the Milwaukee and the Northern line that if the Northern line merger is approved the Milwaukee would have the right to operate from the Longview Junction to Portland as far as the Hoyt Street Yard of the S. P. & S. Railroad, and with that explanation do you know of any point in Portland where the Union Pacific and Milwaukee if the operate to Portland could [232] have a direct interchange between the two railroads?

* * *

A. I can't think of any right now.

Q. (By Mr. Merrill) You have designated North Portland as an interchange point at which you will receive cars from the S. P. & S., and the N. P., and the G. N., have you not, sir? A. Yes.

Q. If the Milwaukee were to operate and have access to this interchange then you could also interchange cars at that point directly with the Milwaukee, could you not, sir, at North Portland? A. I don't think we could.

Q. Tell me why, sir. A. I don't think there might not be enough room until we look in there.

* * *

Q. (By Mr. Merrill) Based on your knowledge, Mr. Baker, you can't say whether there would be any problem at all in that connection, is that right, sir? A. Whether there would be?

[233] Q. Yes. A. I am sure there would be out there.

Q. A problem of room? A. A problem of room in Portland Junction.

Q. And this contemplates how far that the Milwaukee will provide additional track for interchange and assuming the Milwaukee does so, now, could this not be then designated as an interchange point between the Milwaukee and the Union Pacific?

* * *

[235] Q. (By Mr. Merrill) Mr. Baker, at the North Portland Interchange you do have a track on which you receive cars from the S. P. & S., N. P., and G. N.? [236] A. Yes, from the S. P. & S., yes.

Q. Would the Union Pacific have any objection if the Milwaukee had access from the North Portland Interchange to receive cars from the Milwaukee at that time?

* * *

A. I am going to have to answer it in this matter. I would have to take a good long look at it to see what the conditions were and just what it all involved.

Q. (By Mr. Merrill) That is fair enough.

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[240] REDIRECT EXAMINATION

Q. (By Mr. Weisser) You have had cross examination by virtually every counsel here on the sentence on top of page 3 concerning difficulty and indecisive management. Will you give an example of L. P. & N. and the Portland Terminal Railroad, have you got any specifics in those companies other than what you have given I think on the O. P. & N. you have given an example of switching agreements taking better than two years to become consummated. Have there been any other agreements for track building or anything of that nature? A. Like a track agreement right now up there at the L. P. & N. they want to build some additional track and we are agreeable, but there are some of the other lines not agreeable.

Q. Why is this, do they each have their own standard or something they want to impose? A. Just the idea of trying to get together and getting this consummated is all. What reasons they give can be various of their own, because they say for one company, it is I have a common set of standards I have to do this, I have to go to here, and I have to talk to so and so about this, and it is just the way it keeps going.

Q. How big a job was this track agreement, do you recall? A. Not other than it is just continuing back and forth.

[241] Q. Do you know how much track was involved in being built or how much the expense was? A. No, I don't right off hand.

Q. The switching agreement, did that have to do with the rates that had to be paid by the operating company? A. To the L. P. & N., it took over four years for the four owners to decide what to agree to, and it hasn't been completed yet.

Q. What about any difficulties on the Portland Terminal Company other than signing leases and trackage agreements, is there any general reluctance on the part of three lines to agree if the companies they represent don't benefit from the proposal? A. Yes, we have, we are all, can't get together on trackage agreements, just I think Mr. Westergard has one up there with us now in connection with an interchange track. I don't think that has ever been consummated, and that has been in a couple of years.

Q. That is the Portland Terminal Company agreements with the S. P. & S., is that what you are talking about, Portland Terminal agreements with the S. P. & S.? A. Yes.

Q. This is what you foresee might happen on the small railroad Peninsula Terminal Company if more than two were allowed to participate? [242] A. That is right.

* * *

[243] Q. (By Mr. Weisser) Also in your questions of Mr. Wilson you talked of delays in movements between Albina and North Portland, [244] could you describe in your own words just what takes place between the time a Southern Pacific transfer train arrives at Albina and the track therein is ready to be taken out to North Portland, and how the movement is made from Albina to North Portland? A. Well, a S. P. transfer could arrive from the Brooklyn Yard to Albina Yard be yarded into a special track.

Q. What do you mean by yarded? A. Put right into yard. There is two running rails between East Portland and entrance to Albina Yard, and be yarded into Albina Yard on the special track, say, the transfer consisted of 80 cars, let us say there was in this equipment there is cars from the S. P. going maybe on north maybe going to Longview Junction, maybe going to Seattle, maybe other cars going East to The Dalles the other cars maybe in there/

going out to other points Terminal Four, Swan Island, or could be going to—then maybe there is some cars, these are all mixed up, might be two or three cars going to Peninsula Railroad.

Q. Let us take a typical car transfer train, and what is the next process for Union Pacific to do in the handling of those cars? A. You make an inbound inspection, car inspection.

Q. Is this required by law? A. Yes, required by I. C. C.

Q. What is involved in that? [245] A. Car Inspectors check the car over making mechanical inspections as well as safety inspections.

Q. Do they determine then if the cars are safe enough to go on to the next point, is that it? A. That is right.

Q. What if they determine that some cars are out of repairs, what happens? A. Then the car inspector will put what we call a bad tag or defective tag on the car then go to the repair track for repairs.

Q. Then what is this once this inspection is made, what is the next process? A. After the inspection is made we go to switching the cars out. This particular car going out to Peninsula Junction, this car it would be probably classified to a track if it is being made up where we make up the Kenton Yard track for.

Q. When you put it into a specific track do you accumulate other cars along with it then? A. Yes.

Q. Then is there any more switching involved other than setting it into a specific track? A. We go in there and it might turn out you might have to rehandle it again to put it on the headend of your edge, particularly how the yard master and engine foremen line up with connection with his work. If it is a rush car going to Pen- [246] insula Junction it could be put on the headend, where they could go out there and set their cut cars out and take this on over or if it is not a rush car probably could go up to Kenton and be rehandled back into Peninsula Junction.

Q. Peninsula Terminal you mean? A. Or Peninsula Terminal.

Q. Is any of the track come over a S. P. transfer train presently blocked for Union Pacific? A. No.

Q. So you might have a car at one end of transfer train headed for Peninsula Terminal and another car headed for Terminal trainor middle some place and you would have to sort those out? A. That is right.

Q. Then as this is occurring is there any paper work going on in the processing of cars? A. Yes, in the yard office, making lists, cutting IBM card and with the list.

Q. Does Union Pacific, or do you know if it is a matter of railroad practice generally to just take one or two cars out to specific points every time you have those one or two cars available? A. Not unless they request a specific switch or some special movements on them.

Q. Otherwise how are the cars handled? [247] A. Just the normal manner.

Q. Does that mean they are cummulated? A. In other words, if you have let us say 330 Kenton engine has departed so you would start cummulating these cars on their track for 11 p. m. Kenton engine. After 11 p. m. Kenton engine departs or any outlying district then you cummulate this traffic for following transfer.

Q. Is this about what happens prior to the engine being ready to leave Albina northward you move to Peninsula Terminal Company, would there be any other things that require handling or movements by Union Pacific before the train would be ready to leave? A. I don't quite follow your line.

Q. I don't know of any others myself, but would you have to, well, here is one, would you have to check the air in the lines before the train moved? A. Yes, ordinarily after the yard engine comes into this transfer cut then he has to make an air test, what we call a terminal air test

by these yard men. That is your yard men car inspectors.

Q. Then, after this is accomplished is the car or the train ready to move? A. Yes.

Q. The train is moved then on a set schedule, is that it? Are there two train services a day out to North Portland? [248] A. That is what we generally have been doing.

Q. This is covered I believe in Mr. Westergard's testimony, was it not, the times? A. Yes.

Q. As the train is being handled are there other trains being handled in Albina at this time? A. Yes.

Q. About how many do you know at the time would be going through this process you just indicated? A. That could be varied at different times of the day. It could be run into just a heavy number of movements.

Q. Is the switching operation going on at Albina around the clock? A. Twenty-four hour basis. Some hours are much more congested than other hours.

Q. How many transfer trains a day do you receive from Southern Pacific? A. It varies, I think it averages right around 4, I think.

Q. About how many cars would be in each train? A. I am going to say on an average of maybe eighty to one hundred. I could be mistaken.

Q. Would the Southern Pacific pick up the transfers designated for Brooklyn? A. Yes. We accumulate the cars going back to the S. P. and when they come over or sometimes they will run a light engine [249] over to pick up this transfer and take it back. Other times as a transfer they run over they will try to get an engine and put it on there and then take it back.

* * *

Q. What route would an engine that is handling cars destined for North Portland take when it is leaving Albina? A. Going to North Portland?

Q. North Portland, yes. A. It would go out—

Exam. Shoup (interrupting): Counsel hasn't that already been covered by the witness?

Mr. Wilson: I thought he answered me, Mr. Examiner. I certainly thought he gave me the complete description.

Exam. Shoup: I think the route has already been covered in testimony, counsel, to great detail.

Q. (By Mr. Weisser) Are you satisfied that in your previous testimony you covered it? A. Yes, I believe I did.

Q. What about the return move from North Portland, is that [250] also back through Kenton before it comes to Albina, or does that vary? A. It could be, maybe the yard master might decide the engine from Barnes make this termination. It could be flexible out there, all depending, but ordinarily it is a Kenton engine handles that work there.

Q. Are there engines that are being prepared and sent out through the north end of Albina in this manner all times of the day? A. Oh, yes.

Q. In response to Mr. Wilson also you indicated that it was possible to designate a track from the south end of Albina through the north end of Albina and clear it so a movement could be made clear through the yard. Now, what effect would that have on other operations in the Albina Yard if such track were cleared and the through train movement were to take place? A. You would probably have to clear a track.

Q. What effect would that have on your other operations? A. It would just cause that much more congestion in your yards because you are opening up operating track you need which you should have your lead engines switching equipment do.

Your engines would just have to pull off the track and stand there until the track was cleared again. Not necessary pull off and stand there, but you are going to take away that much yard operating room from your yard.

[251] Q. That would be the same on a train movement coming from the north or south through Albina on down? A. That is right, and if it bisected your leads or anything like that you have engines standing still.

Q. This would then interrupt the yard functions and the outbound trains, and inbound trains into Albina? A. That is right.

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[254] RECROSS EXAMINATION

Q. (By Mr. Wilson) Did I properly understand your redirect, Mr. Baker, that the Union Pacific does not have a running track in the Albina Yard but that all tracks are used for yard classification movements? A. Yes. We call the running tracks running tracks No. 1 and running tracks No. 2 between East Portland and, you might say, Randolph Street or the extreme south entrance of Albina Yard.

Q. Now let's talk about Albina Yard itself from South Albina Yard to the end of the yard at the north. Let me ask this question first, do I properly understand that the Union Pacific does not have a running track from the south of Albina Yard to the north of Albina Yard but uses all tracks for yard classification movements? A. Let's put it this way. We will use the entire yard for yard train and engine movements.

Q. But you do keep a running track open, one track or two tracks, somewhere through the entire yard, do you not, at any one time? [255] A. Let me put it this way, we try to but sometimes with heavy congestion periods we are not able to.

Q. And that would probably, that track that is open would be the track that when the Southern Pacific comes up from Portland Yard and leaves the cars in Albina, the locomotive would go on up north and then come back south through that running track and on back to Brooklyn, isn't that true? A. Yes, if the track is open or a specified track.

Q. Actually your performance in providing an open track for the Southern Pacific has been very good for those engines coming up with the cuts to the Union Pacific at Albina, isn't that true? A. I don't think so, because we pay for that time the engine leaves East Portland tower until it returns back by East Portland going to Brooklyn Yard, and sometimes those expenses run pretty high all the time it is at Albina Yard.

Q. Is it your testimony, then, that the reason that that time is excessive in your view is because you do not have a running track open for that locomotive to return to Brooklyn? A. At that particular time, yes.

Q. At what particular time? A. Whatever this time might build up.

Q. Well, there are four different cuts over there every day, aren't there? A. Four to five.

[256] Q. Is it your testimony that there is no running track at any of those times for return of that locomotive? A. No, I can't say that. There will be times, Mr. Wilson, when this will build up due to the fact of congestion.

Q. In other words, it is unusual when that happens? A. Well, maybe in the fall of the year it would be very usual that it would happen. It varies different times of the year.

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[260] Q. Now, I am asking you, sir, if the Southern Pacific, assuming that the Commission were to grant its application, moves with Peninsula Terminal cars from East

Portland directly through the Albina Yard and north to the Peninsula Terminal interchange at North Portland, can you give me any operating reason why that is not feasible? A. Let me put it this way. I couldn't as of right now, however, I would want to reserve a direct answer until, if, and when this should ever come about that we would get a ruling from the I. C. C. on mechanical specifications.

Q. Well, I am afraid, I am afraid I can't wait, because I have to have an answer now, Mr. Baker. This is the record that the Commission is going to look to. A. I couldn't give you an answer there now because I wouldn't know.

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[264] RECROSS-EXAMINATION

Q. (By Mr. Crabtree) I just wanted to clarify one matter on the record. Can the Union Pacific get from its switching yard at Albina to Peninsula Terminal Company on its own [265] track without going out on the main track of the S. P. and S.? A. Yes, it is a joint track from the connection off our line to, with the S. P. and S. ownership in that.

Q. So in order to get from Albina Yard to Peninsula Terminal Company you don't need to occupy at any time the main line that comes across the Columbia River and goes on down to the S. P. and S.'s yard? A. Not getting to Peninsula Terminal Railroad, no.

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JACK M. SANDELL

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Young) Would you please state your full name? [266] A. Jack M. Sandell.

Q. What is your business address? A. 714 West Olympic, Los Angeles.

Q. Who is your employer? A. Collier Carbon and Chemical Corporation.

Q. In what capacity do you serve that company? A. Supervisor of traffic.

Q. Is Collier Carbon and Chemical Corporation affiliated with another company? A. We are a wholly owned subsidiary of Union Oil.

Q. Does your company have a plant located in the Portland area? A. We are currently building a facility in the Portland area.

Q. Where is that? A. Rivergate.

Q. How many acres do you have in the Rivergate area? A. Twenty-five acres.

Q. What will be the approximate cost of your plant, Mr. Sandell? A. Approximately $2,000,000.

Q. When is your plant scheduled for completion? A. In the fall of 1968.

Q. Why did your company select Rivergate as a location? A. Well, we are going to receive material by barge and vessel at that—we have an operation where we are going to bring [267] material in by barge or vessel and reship it by rail and truck and also vessel and Rivergate looked like a very attractive place to us because all these facilities were available.

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Q. Are you generally familiar with the Southern Pacific Company application in this proceeding? A. Yes, I am.

Q. Do you favor the S. P. direct connection at Rivergate? A. Yes, I do.

Q. Would you explain, please? A. Well, we have several plants in the United States and from our experience we feel direct connections with the rail- [268] roads that we are going to be doing business with are more satisfactory, give possibly better service from a transit time and from a car availability standpoint, from a rate standpoint, and so based on these experiences we feel we would like to be directly served by the Southern Pacific.

* * *

Q. Will this Portland plant become your northwest distribution center west of the Cascade range? A. Yes, west of the Cascades.

Q. Will you be shipping in a southerly direction? A. Yes. We will service all of the western portion of Oregon and—yes, out of Rivergate.

* * *

CROSS EXAMINATION

Q. (By Mr. Weisser) Where in Rivergate is your plant being built, Mr. Sandell? A. On the Willamette near the confluence with the Columbia, [269] which is on the east side of the Willamette.

Q. And are you being served by rail now or will a spur be built? A. There are no tracks into our plant at this time.

Q. Are some contemplated, do you know? A. Yes.

Q. Which way will the service come from, the south end of Rivergate or the north end? A. I am not certain.

Q. Well, have you made any efforts or any negotiations or moves to obtain rail service at your plantsite? A. Well, we are aware of the fact that the plant will be served, be rail served both by the Union Pacific and the S. P. and S.

Q. How far is your plant physically from Peninsula Terminal Company, do you know? A. I don't know.

Q. Do you know where Peninsula Terminal Company is located in Rivergate? A. Not exactly, no.

Q. In relation to your plant, is it to the north and to the east? A. I don't know.

Q. Where is your plant in relation to Ashgrove Lime Company in Rivergate? [270] A. I believe it is immediately north towards the Columbia.

Q. Was your plant located in its present position through efforts of S. P. and S. Railway, do you know? A. Yes, we have received assistance from the S. P. and S.

Q. From the Union Pacific? A. Probably.

Q. From the Southern Pacific? A. Probably.

Q. Do you know, on those two probablies, do you know? A. Yes, we have received assistance from all those railroads in locating plantsites for this particular project.

Q. But it was S. P. and S. that did locate you there, is that right? A. I am not positive. I know that they gave us a great deal of assistance.

Q. How many miles, sir—I don't know if you have already answered this—how many miles is Peninsula Terminal from your plant, do you know? A. I don't know.

Q. How is Southern Pacific proposing to serve your plant if you don't know where Peninsula Terminal is? A. Well, it is my general opinion that the Southern Pacific wants to serve our plant and other sites in the Rivergate industrial complex. How, specifically, they intend to accomplish this I don't know. I know we are definitely in [271] favor of them doing it.

Q. By a direct connection with S. P. power coming to your plantsite or— A. Pardon.

Q. By a direct connection with Southern Pacific power coming to your plantsite or by having the Union Pacific act as a switching carrier? A. It doesn't necessarily make any difference. In other words, whether it is S. P. direct or whether it is through some terminal company or a belt line or something of that nature.

[274] ROBERT A LAWRENCE
was sworn and testified as follows:

DIRECT EXAMINATION

[275] Q. (By Mr. Devers) Will you give us your full name, please? A. My name is Robert A. Lawrence.

Q. And you business address? A. 1101 American Bank Building.

Q. And your occupation? A. I am traffic manager, Spokane, Portland and Seattle Railway.

Q. How long have you held that position? A. Since August 1962.

Q. Have you prepared a written statement for the purpose of this hearing? A. Yes, sir.

Q. Is the statement which has been marked for identification as Exhibit 28 your statement? A. Yes, sir.

Q. Is the information set forth in that exhibit true and correct to the best of your information and belief? A. Yes, sir.

Mr. Devers: I tender the witness for cross examination.

CROSS EXAMINATION

Q. (By Mr. Wilson) My name is Wilson with Southern Pacific. Exhibit 26 for identification, Page 4, the last sentence of the incomplete paragraph at the top, Southern Pacific now serves Peninsula industries through its connecting lines and service through direct access is not required in order to [276] afford the public adequate service. Will you please state the basis for that statement? A. If the Southern Pacific served the Peninsula Terminal direct through the North Portland interchange it would cause congestion, delays and increase switching costs, and due to the amount of traffic that is now moving through

that interchange, which I think, which I know amounts to 744 cars in 1966 off the Southern Pacific and 490 in 1967, I think that the railroads involved which is only one or two cars, a day can be handled adequately for you.

Q. Were you in the hearing room when Mr. Baker testified today? A. Yes, sir.

Q. Is it your belief that 30 hours or more to move from Albina to the North Portland interchange is adequate service to the public A. I think any railroad man would like to improve it.

Q. Will you answer my question, do you believe that is adequate service to the public? A. No, sir.

Q. Now, if you will turn to Page 5, please, of your Exhibit 28 for identification, where you refer to the decreases in livestock receipts there about at the end of the first full paragraph. A. I talk about livestock on Page 4.

[277] Q. Well, I am referring to it on Page 5. It is where you say 3,000 cars, do you see that statement? A. Oh, I see, yes, sir.

Q. Can you tell me what projection you as traffic manager for S. P. and S. has made for traffic through the Peninsula Terminal when the Rivergate project is open? A. Well, it is going to be open over a period of years. They have talked about locating grain elevators and other things out in that area. I can't advise you just what they are going to be successful in locating in the area. I hope, I have worked with them on industrial development, and I hope that they will be successful and I think they will have a number of plants. Whether it will meet up to the D. M. J. M. reports I am unable to state.

Q. In other words, you have made no projection of your own— A. (Interrupting) It is a—

Q. (Interrupting) Let me finish, if you will. You have made no projection of your own upon which you based the

decision to purchase a half interest in Peninsula Terminal, is that correct? A. I was asked for a recommendation.

Q. What was that recommendation, sir? A. The same as the management.

Q. To go ahead? A. Yes, sir.

[278] Q. And in making that recommendation did you or were you influenced by the fact that the Peninsula Terminal Railroad serves and has direct access to the Rivergate area? A. I was aware it could serve it but I don't believe I was influenced by that.

Q. In other words, your recommendation to go ahead and purchase the Peninsula Terminal was based solely on the industry that is presently on Penninsula Terminal? A. And some other industry I believed would be located there in the future.

Q. In making that recommendation were you also influenced by the fact that if you and the Union Pacific purchased the Peninsula Terminal you could block the Southern Pacific from having direct access to the Rivergate area? A. Yes, that's right.

* * *

[279] Q. Page 8, if you will, sir, and I am now referring to the sixth line on that page where you say service is presently rendered at a superior level. Now, I take it that the service you are referring to is the service of the Peninsula Terminal Company? A. That's right, sir.

Q. In other words, the service that is rendered to the customer from the time Peninsula Terminal receives the car to the time Peninsula spots the car for the industry? A. That's right, sir.

Q. And in the reverse direction? A. Yes, sir.

Q. You do not have reference to the service from the North Portland interchange down to and other carriers such as the Southern Pacific? A. No, sir, I am talking about the Peninsula Terminal.

Q. All right. Page 2, if you will, sir, the ninth line from the bottom, where you refer to the on-line railroad traffic department's rate personnel. Would you define for me, please, what you mean by the words on line? A. Well, in Portland we have a number of off-line railroad general agents but I am talking to the ones that tend the [280] dockets, North Pacific Freight Bureau coast docket that have representatives of their carriers at this meeting or the joint docket in California.

Q. In other words, we are referring, of course, then, to the railroads that actually physically serve the States of Oregon, Washington, and California generally? A. Yes, they would call on the Southern Pacific, they would call on the Northern Pacific, Great Northern, Union Pacific, and the S. P. and S.

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[281] Q. Now, the decline in traffic that Southern Pacific suffered from the Peninsula Terminal in 1967, do you believe that was because of the inadequate service that you have agreed with me exists? A. No, sir.

Q. What is your explanation, sir? A. It was due to the bankruptcy of one firm and a drop in the pole and piling business and the phasing out of Swift [282] and Company's operation.

Q. And I assume in making that statement that you have actually looked at the loadings from those various industries to make sure that this is the reasons for it? A. Yes.

Q. Now, if those three things had not occurred, was there any new traffic that Southern Pacific was handling to the Rivergate area, to or from the Rivergate area, the Peninsula Terminal area, I am sorry? A. I don't believe so.

* * *

[283] Q. Are you aware of the fact that there is now a standard size module for containers throughout the world? A. No, sir.

Q. As to traffic man for the S. P. and S. have you had any interest in the location of containerization locations in this area? A. I have been following it without interest and my people have.

Q. And one of the most important would be the Japanese container ships? A. That's right, sir.

Q. Did the S. P. and S. send a delegation to Japan to investigate this? A. No, sir.

Q. Have other railroads? A. Yes, sir.

Q. Was the Southern Pacific one? A. I don't know.

Q. Was the Milwaukee one? A. I don't know.

Q. Do you know any of the railroads that did? A. Our parent lines did.

Q. Now about ports, are you aware of any ports that have sent delegations to the Far East to look into container shipping operation? A. I believe the Commission of Public Docks in Portland have [284] done it. They made a talk at the last advisory board on it.

Q. Would you agree with me that the importance of that type of operation is that the ships from Japan can move into a West Coast port, deliver all of their containers and then return to Japan for additional traffic and have all of the traffic from the West Coast distributed nationwide by rail? A. That's right, and even across the country.

Q. Has the S. P. and S. given consideration to the location of containerization facilities at Rivergate? A. No, sir.

Q. Are you aware of the fact that Datsun automobiles are presently being brought into Portland in special ships? A. No, sir. I am aware they are here but I didn't know they came in special ships.

Q. Well, are you aware of the fact that those ships unload a portion of their automobiles here—

* * * *

[285] A. I am not aware that they are unloading a portion here or Seattle or what are you talking about, I didn't get that.

Q. (By Mr. Wilson) I am talking about the concept, doesn't it make sense to you if, in fact, the Japanese ships are coming in with Datsun automobiles and unloading at various West Coast ports that if they could unload at one and distribute by rail that it might be advantageous to your railroad? A. I agree. I know that the Northern Pacific and the Great Northern, our parent lines, are very active in this. We [286] know every port on the Pacific Coast they are active to try to influence, I think it is six Japanese ships, if I remember correctly from, I remember Mr. Hanson's testimony, I think, that are being put into this service. Which port they are going to select or where they are going to locate I don't know. I was under the impression that the Commission of Public Docks facilities would be Terminal No. 4, not Rivergate, I might be wrong there.

Q. Does it strike you as an expert traffic man that Rivergate might be an excellent location for that type of an operation? A. It could be.

Q. But, if I understand your testimony correctly, you have not made any projections of traffic to or from the Rivergate area on behalf of the S. P. and S.? A. When I look at the area we are talking about and I see that originally a small portion of it is going to be filled in 1968 and it is going to run through to 1973 before they are completely or later, it is going to be coming in sections. I don't expect that to develop very quickly.

Q. It might develop even quicker, however, if the railroads took an interest in the development, would it not, Mr. Lawrence? A. I have taken quite an interest in the development. I have brought several people to the port.

We spent just as much time on the Rivergate industrial district, bringing [287] clients there that are interested in locating in the Portland area as any other railroad.

Q. If a railroad did not have direct access to the Rivergate area in your view as an expert traffic man, would they have the same incentive for locating traffic in the Rivergate or locating industry in the Rivergate area? A. I doubt it.

* * *

Q. (By Mr. Ploeger) On Page 3 of your testimony you refer to your Exhibit Ral-1, which is a copy of an agreement between the Milwaukee Railroad and the Northern Lines, including the S. P. and S. A. Yes, sir.

Q. That covers the now and in what way condition No. 2 and the Northern Lines merger case would be generally implemented, is that right? A. Yes, sir.

Q. Now, in the Northern Lines' merger case one of the conditions the Commission imposed was that the Milwaukee should have equal access to Portland in all of its industry, did it not? A. Yes. First, I would like to say I am not authorized to speak for the new merged company. I did not participate in any of the negotiations with the Milwaukee. All I can say [288] and all I am authorized to say is that the contract will have to speak for itself.

Q. I am not asking you now in connection with the contract. I am saying that the Commission has a condition to a Northern Lines' merger, including the operation of the S. P. and S. required the Northern Lines to grant to the Milwaukee operating rights to Portland and to all industry in the Portland switching district on an equal basis. A. To the best of our ability.

Q. Now, you say the Milwaukee now reaches Peninsula Terminal through its connecting carriers and joint rates and routes. Now, that is not the same thing as operating

into Portland and serving the industry on an equal basis, is it? A. No. At the present time you are reaching it, the connection with Northern Lines, through Spokane to the Twin Cities at Cheallis.

Q. And it is your intention that if you obtain control of the Peninsula together with the Union Pacific that you could block the Milwaukee's use of the Peninsula Terminal Company? A. No, sir.

Q. What is your purpose? A. To show that the existing rates, routes, and channels of trade that exist as of today will not be affected by the proposed acquisition of the Peninsula by the applicants.

Q. Is it your intention that after the Northern Lines are [289] merged that the Milwaukee will still be able to reach Peninsula Terminal Company in the same way they do now? A. No, sir.

Q. How would they reach it? A. I can't answer that.

Q. You don't know? A. I don't know.

Q. Now, is it not a fact, sir, that if the carrier who switches the plant or owns the Terminal Company that switches the plant has an advantage in the solicitation of freight over a carrier, any other carrier serving the same station? A. Normally it is felt that.

Q. And normally isn't there a delay when you switch through a reciprocal agreement than having an immediate carrier handle it for you? A. Yes.

Q. In fact, did you not testify in the Rock Island merger case? A. Yes, sir.

Q. And in that case did you not outline that there was a delay of 12 to 24 hours a day when the Union Pacific switched for the S. P. and S. in the zone 6 area in Portland? A. That is through the Barnes interchange that you are talking about, yes.

Q. And that was when you interchanged at North Portland or [290] at the main Portland Terminal Company interchange point? A. Yes, sir.

Q. You also said, did you not, in that case, that because of this delay the S. P. and S. and the two Northern Lines were at a disadvantage in serving the industries and obtaining a share of the business? A. That's right, sir.

Q. And that the Union Pacific used this delay in soliciting traffic against you, is that true? A. I believe so.

Q. Now, if the Milwaukee can only reach Peninsula Terminal Company through a switching arrangement rather than direct access to the Peninsula Terminal Company and equal voice in its affairs, will not the Milwaukee be at a disadvantage as against the Union Pacific and S. P. and S.? A. I do not know at this time where the interchange will take place.

Q. It won't take place at North Portland unless the application in this case is granted, isn't that true? A. I don't know.

Q. Is that because you don't know because you are infamiliar with what the arrangement ultimately will be as between the Great Northern Pacific and Milwaukee or is that because you don't know generally? A. Because I don't know the negotiations that will be carried [291] on between the new company on the Milwaukee.

Q. Can the new company carry on negotiations on behalf of the Union Pacific and Peninsula Terminal Company also? A. I don't believe they can.

Q. And if they cannot, then would you expect that the Milwaukee would be able to make any kind of an arrangement with the Northern Lines for the use of the North Portland interchange tracks? A. I think Mr. Westergard testified that an interchange could be put in at East St. Johns and you could reach it through reciprocal switching at that point.

Q. So then we would set out what you mean by reciprocal switching is tariff connecting line switching? A. Yes.

Q. So the Milwaukee would be required on competitive traffic to absorb and S. P. and S. switch charge plus Peninsula division, is that right? A. Yes.

Q. And as you have testified, I believe this would require the revenue accruing to the Milwaukee to be substantially less than they would be in the case of either the Union Pacific or the Northern Lines?. A. I don't know how substantially less it would be. I don't know what the cost would be.

Q. You don't know what the switching charge would be absorbed [292] are? A. Not at this time.

Q. What are they now on competitive traffic? A. Six cents.

Q. Six cents a hundred pounds? A. That is being adjusted on the Portland switching study.

Q. That there is a proposal to adjust the switch charges in Portland? A. Yes.

Q. And that is the tariff switch charges? A. Yes.

Q. And that is a pretty teriffic arrangement that has not been accepted by everybody, is that not true? A. I believe all the railroads here hope to have it implemented at all common points in the Northwest sometime this year.

Q. Do you also expect to have your merger implemented sometime this year? A. I wish that was true.

Q. So we are all talking about perspective matters, are we not ? A. That's right, sir.

Q. Then, in addition to the six cents a hundred that is currently in tariffs to be absorbed, the Milwaukee would have to absorb the division of the Peninsula Terminal Company? [293] A. Yes, sir.

Q. Do you know what those divisions are? A. Yes, I believe they were testified by Mr. Rockford here the other day.

Q. And that is \$29 generally? A. \$29.25 when the revenue is over \$60.

Q. Do you agree that the more a line-haul carrier has to absorb, the less interest it has in the development of traffic on connecting lines? A. It depends on how attractive the business is.

Q. And on the unit train rates and others low rates commodities they don't even absorb, isn't that true? A. That is true in some cases, most cases.

Q. And if they don't absorb, then the shipper has to pay the switch charge on top of the line haul rate, isn't that true? A. That's right.

Q. If that is a fact, then that carrier is less likely to be the selected carrier for use by the shipper, isn't that right? A. That's right.

Q. Now, you say 1 per cent of the business that is now handled to and from the Peninsula Terminal Company is Milwaukee business? A. I would like to qualify that. It is Milwaukee business where you served as one of the, either the originating carrier [294] or one of the immediate carriers in over-the-road service.

Q. And we also might have served as a terminating carrier. A. Not as a terminating line.

Q. All traffic that originates on the Peninsula Terminal terminates on someone else's line if it is—. A. (Interrupting) I see what you mean it could terminate on your line.

Q. Is it anticipated that if the Milwaukee extends its line to Portland that it might participate in a greater share of traffic to and from Peninsula Terminals? A. That's right.

Q. Provided it can give a service that is equal to that of other lines? A. That's right, sir.

Q. Is it true, then, that if the Milwaukee does not have joint ownership in Peninsula Terminal or to or from the Rivergate area and use of the interchange tracks, it would not be on an equal basis with your line or the Union Pacific, would it? A. No, not on an equal basis.

Q. I think it has been testified that the S. P. and S. performs a switching for the two Northern Lines itself and the Union Pacific at Vancouver now? A. That's right, sir.

Q. And that is under arrangement whereby the Union Pacific [295] has a right to serve all the industries in Vancouver? A. No, sir.

Q. Under its agreement? A. Anything that comes off the N. P. main line.

Q. All traffic off the N. P. main line, all industry? A. That doesn't include the Evan area of Vancouver which we serve direct.

Q. That is, the S. P. and S.? A. Yes.

Q. But they do have the right to, themselves, serve all the industry connected with the Northern Pacific main line in Vancouver? A. Yes, but the S. P. and S. does the switching for all four lines.

Q. And that works out well? A. Yes.

Q. And you take orders from all the four lines for whom you perform services? A. The joint agency and yard forces

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[301] WILLIAM H. KRAUSE

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Skirvin) Would you please state your name? A. William H. Krause.

Q. With what company are you associated? A. Crown Zellerbach Corporation.

Q. What position do you hold with that company? A. Assistant general traffic manager.

Q. Have you prepared written testimony to present in this hearing? A. I have.

Q. Is the statement I have handed to you entitled "Testimony of William H. Krause, Assistant General Traffic Manager, Crown Zellerbach" this testimony? A. Yes.

Exam. Shoup: The statement is marked Exhibit 38 for identification.

(Intervener's Exhibit No. 38, Witness Krause, was marked for identification.)

Q. (By Mr. Skirvin) Is Exhibit 38, this document, true and correct to the best of your knowledge and belief? A. Yes

CROSS EXAMINATION

[302] Q. (By Mr. Weisser) Mr. Krause, my name is Weisser with Union Pacific Railroad. I have just a few questions concerning your statement. You make a statement on Page, in the second paragraph, I should say, on Page 1, toward the very bottom of the page it says "Being forced to consider expansion of its distribution complex known as Waterway Terminal Co. to the Rivergate Industrial area of north Portland." What portion of the Rivergate area is this expansion going to take place in? A. Well, it would be adjacent to the Ashgrove Lime and Portland Cement Company, the present location, and to the east thereof.

Q. It doesn't connect with Peninsula Terminal? A. No, sir.

Q. It is not within three or four miles of Peninsula? A. That is right.

[303] Q. Now, in your use of Waterway Terminal as a distribution facility, isn't it also true that you have a barge line which participates in joint through rates and routes? A. There is a common carrier barge line named Wester

Transportation Company, which serves various locations on the rivers and serves our plants as well as other plants, including some other paper plants, and moves traffic on through joint rates into Waterway Terminal for either storage or direct through shipment where the transfer is performed to rail cars, so they are joint water-rail rates.

Q. And this Waterway Terminal, by whom is that owned, do you know? A. Well, it is Wester Transportation—it is Waterway Terminal Company. It is a subsidiary company of Crown Zellerbach.

Q. I misspoke myself. Wester Transportation, by whom is that owned? A. It is a subsidiary company of Crown Zellerbach.

Q. That is a common carrier with a certificate under the appropriate Water Carrier Acts? A. Yes, sir.

Q. Through the Waterway Terminal Company and the handling of traffic, which is either stored or destined for that point for further distribution, all rail carriers participate in the routings that Wester Transportation has, is that correct? A. Yes.

[304] Q. That would include the Milwaukee and the S. P.? A. Yes, that is right, of course, depending on the areas. It can become rather limited. The Milwaukee's participation is rather limited. Is it not much of a factor?

Q. But the S. P. is rather broad, is it? A. Oh, yes, it is a main artery into California and beyond and through Ogden, Utah.

Q. In your handling of poles from your pole yard at the west extremity of Peninsula Terminal you draw on all railroads for cars, is that correct? A. Yes, all railroads that have cars in the area.

Q. Have you, then, received upon request cars from the Northern Pacific, the Great Northern, the S. P. and S.—well, strike that.

The P. S. & S. cars come from one of their parents, is that correct? A. I would assume so, except I have some— first of all, the S. P. & S. has not all of the cars, the types we need, it has no drop-end gondola, 65-foot cars, at all, so the only cars that we load out on the S. P. & S. are flatcars. Those flatcars, I understand, are supplied out of available cars in the area. I believe that orders are placed with the S. P. & S. directly through S. P. & S. rather than through the joint agent.

Q. Well, then, you also receive cars from Southern Pacific and Union Pacific? [305] A. Oh, yes.

Q. As it stands now, have you received cars upon request from Milwaukee, from Milwaukee outbound routings from Peninsula Terminal? A. No.

Q. You are nodding your head, no? A. No. I'm sorry.

Q. But if Milwaukee is granted access to Portland as part of the northern lines' merger, would cars be made available to you notwithstanding their ownership or notwithstanding that they do not participate in ownership with Peninsula or have rights through the north Portland interchange? A. I would hope so. That is one reason we are anxious, we are very happy to see the Milwaukee in this case. It gives us another source of cars, which are very short supply. When there are not many cars over the whole system of these railroads.

Q. On the bottom of Page 3 of your statement, the next to last paragraph, you mention the extreme importance of single-line service because it guarantees single-line rates and removes the question of whether or not switching charges are absorbed. Is there any question as to whether or not switching charges are absorbed from your plants on Peninsula Terminal? A. Yes, it could very well be, depending on what the circumstances of movement are.

We ordinarily have through joint [306] rates, but to Oregon, for example, we would have to move out under switching charges and a local rate from Portland. We have instances wherein it is not a very good situation, although we are not alleging those.

Q. Have you ever had to pay a switching charge in traffic moving to or from your facilities at Peninsula Terminal? A. I can't say that we never have. To my knowledge, it would be very rare, if ever.

Q. Well, what would be the extent of your knowledge, would you know if it occurred in the last five years, say? A. I might not. I would hope that if—I would not know unless someone reported it to me. As I say, it would be extremely doubtful, because I have looked at the pattern of our shipments and at the present time and the way our shipments are patterned and the area we serve, we would not have to pay these charges today.

Q. Now, have you been able to reach all the markets you desire from your north Portland facilities on Peninsula or have traffic from these markets reach these areas under— A. (Interrupting) Let me put it this way. As operations are presently conducted at both the pole yard and the flexible packaging division, we have been reaching our markets, yes, I might say to California, for example, from Peninsula Terminal we had only three shipments by rail into California, so you see that has not been a very important market at the [307] moment, but it could change at anytime.

Q. Have you had any difficulty in the past negotiating sea connections and rates so you will be able to reach your markets on a fair and equal basis? A. So far we have been able to remain competitive, but it is a struggle at all times because the more carriers that get involved in the joint rates, the more money there is to split up between

the carriers, and we have instances where, depending on the routes we want to use, we are not competitive. One route can be higher than another.

Q. So you use the route which has the lower level, is that right? A. Ordinarily, yes, surely we would.

Q. But you could still get to the same destination, is that correct? A. Yes, but your question was whether or not we, whether or not there is a problem in negotiating rates, and there always is. The more revenue that has to be divided between carriers, the more difficult it is.

Q. At the top of Page 3 you give some figures on delay time. This sentence, it says, "Of the one hundred seventy-seven shipments made during the twelve-month period ending November 30, one hundred fourteen or sixty-four per cent involved delays running from one day to twenty-six days in length." How do you compute your delays? [308] A. Not from the time a shipment is ordered, but from the time—we place orders in advance, we anticipate our requirements.

Q. How far in advance? A. Well, three, four, five days in advance at times. I can tell you on the basis of single shipments, if you want to pursue it. But the point is we don't count a delay until, if a car isn't there on the date we are asking that it be available, we count our delay from that date, not from the date of ordering.

Q. What about, say, you order five cars and you receive two of them two days before you ordered them and the other three right on the date you ordered them, would there be any delay there? A. No, we don't count that as a delay.

Q. What about the days you have the cars in advance where you can get them lined up? A. They are not of value, because, you see, poles move out in multiple shipments. If we have a length of pole or piling that extends

over the ends of, say, a sixty-five foot drop end gondola, you have to put in an, normally they put in a forty-foot flat-car and idler on either side, so we need three cars. We must order three cars for that one loaded car of poles or piling. We can't release that order until we have the three cars, so it doesn't do us a bit of good to have three in that case, or if it is a five-car order to have four. [309] We can't do a thing unless we have got all five. These are shipment delays, they are not car delays, car delay of shipments, because then I would have many times more delays. These are shipment delays, failure to ship on the day desired.

Q. I am not sure I have that clear. Let me ask you this question, maybe this will clear it up. Assume you ordered five cars and you received four on the date that you ordered them and you received one car two days late, would you count all five cars as being two days late? A. We haven't counted cars, we have counted only shipments. We are not saying these are the number of car days delayed. They are simply the number of shipments delayed. As I say, we have many more cars in the computation otherwise.

Q. Of these 114 shipments which involve delays, do you have any figures on what lines were handling each or do you have a breakdown? A. Yes, I have.

Q. Could you give that to me, please? A. Would you like to look at it?

Q. Well, can you just read me the figures? A. Surely.

Q. To make up the total 114. A. Yes. Northern Pacific, 75 per cent of the shipments were delayed.

Q. How many shipments did you have via— [310] A. (Interrupting) Well, there were four, one where the cars were all delivered on time and three late.

Southern Pacific, 34 shipments, 15 on time, 19 late.

Q. O. K. A. Union Pacific, 40 shipments, 12 on time, 28 late.

Great Northern, 81 shipments, 33 on time, 48 late.

S. P. & S., eighteen shipments, two on time, sixteen late.

Q. Have you computed the percentage on each of these? A. I have.

Q. What would be the percentage late on each of these? A. N. P., 75 per cent; S. P., 65; U. P., 70; G. N., 60; S. P. & S., 89.

Q. Now, these shipments, these 114 late shipments of a total of 177, these were all shipments that were destined to points on the line that furnished the equipment or their connections, is that correct? A. Yes, that is how we determined it in every case, that is right. In other words, it is where the carrier, where it was the outbound carrier, except in the case of the U. P.-S. P. route, where the U. P. makes the initial movement but the S. P. furnishes the car.

Q. Or the S. P. & S. could make that same movement, could they not, S. P. & S.; Southern Pacific route? A. No, not always, no.

Q. Well, through the Portland Terminal? [311] A. If we have routes.

Q. Do you have routes that way? A. We usually have routes, yes, to the territories we are serving.

Q. Do you have any other pole operations in the country that you know of? A. No, we have none other than this one.

Q. You don't have any basis for comparing whether or not this is relatively good performance for railroads nationally? A. I wouldn't, no. You mean as far as pole yards?

Q. Yes. A. I couldn't say.

Q. Isn't it true that the type of equipment you require is one of the scarcer types that railroads attempt to keep in inventory? A. It is.

Q. It is extremely difficult to satisfy the shipping needs of all pole yards with this equipment? A. It all depends on how you look at it. I always felt carriers should anticipate needs, and they certainly know that the needs exist on gondola cars, but they have never filled those needs.

Q. Is an average of four and a half days' delay per shipment something that you work with, then? A. We live with it, yes.

[312] Q. And you are able to conduct your business with it? A. We have been conducting it that way, but it places a lot of burdens on us because we compete with southern pine in some areas, with cedar and with other commodities like prestressed concrete poles and piling or steel poles and piling. Many of these alternate materials are available much closer to the market, and, of course, we are competing with a number of pole and piling yards right in the Northwest, all of which have different locations problems as far as railroads.

Q. You receive cars from S. P. now for your pole yard, so your basic support of the acquisition in this case is from Milwaukee, is it not, rather than S. P.? A. No, it is not.

Q. Isn't your prime reason for the pole yard to get access to the Milwaukee supply of special equipment? A. No.

Q. Then your only other request is to attempt to get speedier delivery of S. P. equipment, those are the two bases? A. We are supporting all applicants. We hope with the proposed purchase of the Peninsula Terminal by the S. P. & S. and the U. P., for example, if we stop there, when they own that, if they acquire it, they will give more

attention to our needs than we are presently getting, and if more people own it there will be more that have, you might say, direct access. It has the effect of putting our pole yard on these lines. [313] We are not on any of the lines today. We are on a little switching line.

Q. You are not asking for physical moves into your pole yard, are you? A. We don't want physical moves into the pole yard, no.

Q. You still want Peninsula to be retained as an independent company, do you not? A. We have made no statement as to what we want in that respect.

Q. I see. O. K.

Mr. Weisser: That's all.

CROSS EXAMINATION

Q. (By Mr. Tjossem) Mr. Krause, I gather from your testimony that your company supports the application of the S. P. & S. and U. P. to acquire the Peninsula, you believe that would be proper, but you would prefer that the other applicants have also be joined in that ownership? A. We are asking that all applicants be authorized to join in the ownership.

Q. But if the Commission concluded not to do that, you would still support the acquisition by the S. P. & S. and Union Pacific? A. Not unless the conditions of trackage rights are made a part of the total package.

Q. I thought you just said you felt if the S. P. & S. and U. P. [314] acquired it that they would see to it that you had better service than you are getting now? A. I didn't say that. I am hoping with more owners in there the service will improve in many areas.

Q. Well, I notice in this period you covered on your determining your delayed shipments that you had 34 shipments by the Southern Pacific. Do you feel if they had access, if they had access during this same period that

you would have called on them oftener for furnishing cars? A. I am quite sure we would have

Q. Do you know what the destinations were on those 34 shipments? A. Well, they were points in California, I think there were several into Texas. One of the principle points in California is Oroville, California, which is served by the Western Pacific and the Southern Pacific.

Q. Now, I noticed— A. (Interrupting) We shipped both ways into Oroville, California.

Q. Via the Great Northern? A. G. N.-W. P. or W. P.-S. P. But the movement outbound, as I understand, takes longer when it routes out in connection with the G. N.-W. P. via the U. P.-S. P. today. On the other hand, in the securing of cars, if we are able to getting in cars, they can move—we have more directions to utilize them, so what we [315] have to do, we—when we are talking about these orders being late or these shipments being late, that doesn't mean we just sit by waiting for that. What we have to do, because they are so late and we have to manage to keep up some semblance of moving our orders out, we will switch our destination. Now, with a northern-route car it can move north and south, particularly like into Oroville, we have more flexibility to change than if we have an S. P. route because they are much more limited, and with Milwaukee there is virtually nothing.

Q. I gather what you are saying, if you had a shipment going to Oroville, for example, and you placed an order with the S. P. and is to be furnished by the Great Northern and if those cars weren't furnished you would then also at the same time be asking the Southern Pacific to furnish those cars? A. I don't know just how that works. The orders are placed with the joint agent and the—I might say, on pole yard shipments, with very few exceptions, the orders that we are supposed to use are

specified by the purchaser of the poles. They also give us, they give us a preferred route and then alternate routes so if we can't ship via the preferred we go to the first alternate.

Q. In other words, the routing of these poles actually is done by your buyer rather than by you? A. Exactly.

Mr. Tjossem: That's all I have.

[316] Exam. Shoup: Are there further questions of this witness?

CROSS EXAMINATION

Q. (By Mr. Delisi) Mr. Krause, for the benefit of the company near here, sir, for that matter for my benefit, I want to be sure it is clear how many facilities Crown Zellerbach has in what you term "the greater Portland area". Now, first, do you have in the City of Portland what you call the distribution complex, Waterway Terminals Co. A. Yes, sir.

Q. Referred to at the bottom of Page 1? A. Yes.

Q. Is that the facility located or served by the Portland Terminal Railroad? A. Yes, it is.

Q. Now, then, do you have a second facility, which is the pole yard, which is presently in Rivergate Industrial District? A. Yes.

Q. Presently served by Peninsula Terminal, right? A. Correct.

Q. Now, then, the third facility that you have purchased, that Crown Zellerbach has purchased, is the Swift and Company property adjacent to your north Portland flexible packaging division, is that correct? A. Yes.

Q. And that is in north Portland? [317] A. Correct. It is also on the Peninsula Terminal Railroad.

Q. That is referred to on Page 2 of your statement. Is the flexible packaging division presently in operation? A. Oh, yes.

Q. And the new 200,000-square-foot warehouse will be in connection with that facility? A. Yes.

Q. And is that facility presently under construction? A. No, it is not. Actually the consummation of the purchase is not, complete. We are about a week and a half away at the moment from completion.

Q. Pretty close to tying it up? A. It is tied up, but it hasn't come out of escrow yet.

Q. Details? A. Well, yes, but nevertheless.

Q. Is there also another facility in the Rivergate Industrial area on the southeast side for which you are presently in negotiation with the Port of Portland? A. Yes.

Q. Could you tell us generally where that property is? A. Well, the area that is considered is adjacent to and east of the Ashgrove Lime and Portland Cement Company.

Q. Does it have waterfront? A. Fifteen hundred lineal feet of waterfront.

Q. Is that matter currently in negotiation? [318] A. Yes, it is.

Q. How close are you on that one? A. I prefer to await developments. We are, I think, firming it up rapidly.

Q. You want the horse in the barn? A. Well, that is where it should be before you talk about it.

Mr. Delisi: Thank you, sir.

The Witness: You are welcome.

Exam. Shoup: Mr. Green.

CROSS EXAMINATION

Q. (By Mr. Green) Mr. Krause my name is Mr. Green. Now, I did not get a copy of your statement so I do not know exactly what it said, but listening to your conversation and statements, do I gather that your interests in the ownership of the Peninsula Terminal Co. is greater

than your interest or as great as your interest in having cars of the type you wish available? A. We bring in this car-supply problem as an example of why we have this interest. It becomes pertinent because there is a proposal here to change the status quo as far as ownership of the Peninsula Terminal. That change may, we hope, should, we hope help car supply.

Q. Well, Mr. Krause, you mentioned being in competition. Have you made any inquiries as to the problems of your competitors in this area for large cars? [319] A. No, I have not.

Q. Would you feel that your delay is unusual as compared with other comparable industries requiring that type of car? A. I don't—I have no feeling about it because I have made no comparison.

Q. Once the cars are there and loaded and they are ordered out, do you have unusual delay in having those pulled from your industry? A. I haven't heard of any.

Q. You mentioned about certain improvements you hoped would happen. This may give you an opportunity to speak of those improvements. Do you have a suggestion as to how the actual improvements would or should be made or what improvement would help you? A. Well, sir, I guess as far as car supply, regardless of what happens, my only suggestion is that more cars would be made available. As far as other improvements, mention was made yesterday of the condition of the Peninsula Terminal physically insofar as it being viable to becoming a larger or more heavily saturated traffic railroad. A disability we have had all of the time we have been there, of course, is the fact that there is a 22 degree curve in the line. That precludes us from moving 85-foot flatcars into the pole yard. Now, we have a disability in the pole yard itself. We couldn't move it at the moment within the pole yard gate, but we would straighten [320] that out if there was, if the other was straightened out.

Q. Mr. Krause, if this trackage was improved so as to handle the longer cars, this would actually improve the conditions you are thinking of in that area? A. Physically, yes, that's right.

Mr. Green: Thank you.

Exam. Shoup: Are there any further questions of this witness:

(No response.)

Exam. Shoup: The Examiner has one question, it relates to the exact location of your pole yard. Could you identify on a map, which has been identified as Exhibit 37 in this record, the location of your pole yard?

The Witness: It would be right here at the very end of the Peninsula Terminal (indicating).

Exam. Shoup: Is that at the eastern—

The Witness (interrupting): It is at the western end. There are 40 acres approximately that lie in here (indicating) in the Rivergate, on the so-called Rivergate property, and the spur runs right in through here (indicating) and this is the end of the main line of Peninsula Terminal at the present time.

Exam. Shoup: The pole yard, then, is located at the end of the Peninsula Terminal line which terminates at or near the Watergate project, is that correct, sir?

The Witness: Near the Rivergate project.

[321] Exam. Shoup: And the Swift property is located in a block described on the map as 32, is that it?

The Witness: No, sir, the Swift property is located—well, it is located about here (indicating), I guess, because—about here (indicating), because the flexible packaging division is right here (in-

dicating). I think that represents flexible packaging and the Swift property lies in here (indicating) and it is adjacent to the flexible packaging plant of Crown Zellerbach.

Exam. Shoup: What is the distance from the main line of the S. P. & S. on the Peninsula Terminal line, is the Swift property located, is it a half mile?

The Witness: About four blocks. The main line runs right here (indicating). The present flexible packaging plant is right adjacent to the main line and—

Exam. Shoup (interrupting): The Swift property—

The Witness (interrupting): Is adjacent to that, so it would be—

Exam. Shoup (interrupting): About 500 yards from the line?

The Witness: Yes.

Exam. Shoup: Thank you, sir, the Examiner has no further questions

FURTHER CROSS EXAMINATION

Q. (By Mr. Weisser) Mr. Krause, could you point out where your proposed Waterway Terminals would be on the Willamette River [322] side of Rivergate Industrial area? A. It is a little hard to identify, but it would be right in here (indicating). Here is Ashgrove Lime (indicating), it would be adjacent to Ashgrove Lime.

Q. Near 34 on the map? A. Yes, 34 on the map, it would run like that, 1,500 feet across the front.

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[326] RONALD W. McINTOSH

was sworn and testified as follows:

[327] DIRECT EXAMINATION

Q. (By Mr. Weisser) Would you state your name, please. A. My name is Ronald W. McIntosh.

Q. By whom are you employed? A. I am employed by the Union Pacific Railroad Company.

Q. In what capacity? A. General freight agent rates and division.

Q. Have you prepared a statement for this proceeding? A. I have.

Q. Has it been marked as Exhibit 29, to your knowledge? A. Yes, sir.

Q. Do you have a copy of what has been marked as that exhibit before you? A. Yes, sir.

Q. Is the content of this exhibit true and correct to the best of your knowledge, information and belief? A. Yes, sir.

* * *

CROSS EXAMINATION

* * *

[329] Q. What interest does Union Pacific have in a receiver on the Southern Pacific lines in the State of Arizona? A. They would have considerable interest if a shipment is originating from a point on our line to industry in Arizona in establishing joint through rates with the Southern Pacific.

Q. Let's talk about a shipment originating on the Peninsula Terminal. What interest does the Union Pacific have in the shipper or in the receiver in Arizona for that shipment from Peninsula Terminal to a point on the Southern Pacific in Arizona? A. We would have an interest with respect to if the rate was published from North Port-

land. However, if the rate was published from Portland then you absorb our noncompetitive switching charges and divisions to us and our interest would not be as great.

Q. In other words, on such a shipment all you would get would [330] be the switching charge. A. That's correct, sir.

Q. As a matter of fact, you would always get that switching charge because it is the only way that shipment could move via S. P., isn't that a fact? A. That is correct.

Q. So Union Pacific as a railroad really has no interest in the shipments such as that or the interest of the shipper or the level of the rate does it, sir, because it gets its switching charge no matter what the level of the rate, isn't that a fact? A. As I said just previously, we would have an interest if we establish a rate from North Portland, we would have an interest.

Q. In the switching charge? A. We would have an interest in a joint through route with the Southern Pacific.

Q. And your interest would be the switching charge that you would receive. A. That's correct.

* * *

[331] Q. Have you made any projections of what traffic might be available from the Rivergate area through the Peninsula Terminal which Union Pacific would have an opportunity to solicit? A. No, sir. I will say again I am a rate officer and I do not project traffic. We handle strictly rate matters.

Q. I appreciate that, sir, but I am attempting to cross-examine you on the fact that you have indicated that the industries [332] will be adequately served. I would like you to tell me what is your definition of adequate service from the North Portland interchange to the East Portland interchange with Southern Pacific. A. To be adequately served I am speaking of rates, the establishment of the present joint through rates that we had with your line.

Q. All right, so that we both understand each other then, when you say that all industries will be adequately served, you have no reference to physical service but only to rate treatment. A. No, sir.

Q. Is that correct? A. That is correct, rate treatment.

* * *

[333] Q. Now will you tell me, sir, why Union Pacific opposes the Southern Pacific application for relief under Section 35 and Finance Dockets 24890 and 24891 and why the Union Pacific opposes the Southern Pacific's petition for inclusion under Section 52(d) of the Interstate Commerce Act. A. One of the most important fundamentals of any business is to protect your investment and interest. We certainly have a large investment in our facilities that serve Peninsula Terminal Company.

Q. So am I correct in understanding your answer that what the Union Pacific fears is that if Southern Pacific has a direct connection to Peninsula Terminal that Union Pacific will lose business? A. Correct.

Q. And that is the reason for your opposition? A. Yes, sir.

Q. And by opposing Southern Pacific, and let us say successfully opposing them in this proceeding and becoming a joint owner with the S. P. & S., is it your belief that that will then block the Southern Pacific from access to the Rivergate area through the Peninsula Terminal? A. No, sir, that is not my belief.

Q. It is not. What is your belief? A. You can still handle traffic through joint rates and routes [334] as you do today.

* * *

[334] Q. Now, would your testimony be the same if this record were to show that it were in the public interest for Southern Pacific to have direct access to Peninsula Terminal?

* * *

A. Yes, and at the same time we are protecting the investment of the industry by establishing through rates and routes. We always have the public interest in mind when we negotiate joint rates.

Q. (By Mr. Wilson) What capital investment does Union Pacific have in Rivergate today? A. I cannot answer that.

Q. What capital investment did you refer to here? A. Investment of properties, of railroads serving or connecting [335] with the Peninsula Terminal.

Q. In other words, the line from Albina yard—in other words what you are referring to is the investment in physical facilities of the Union Pacific between Albina yard and the North Portland interchange with Peninsula Terminal, is that correct? A. Yes.

Q. What is that investment? A. I have no idea.

Q. On page 3, sir, the last portion of that first full paragraph at the top of the page where you indicate that it will be the policy of the applicants in acting upon such requests not to discriminate or show any partiality toward connecting rail lines, is that the policy that is in effect today or is this a change? A. No, sir, the same policy is in effect today.

* * *

CROSS EXAMINATION

[335] Q. (By Mr. Merrill) Mr. McIntosh, referring to page 2 of your statement, the last sentence of the second paragraph, you said, "Likewise, on traffic in which Milwaukee participates through joint routing, no switching charges are passed on to any industry." Then on pages 3 and 4 I believe you discussed the new [336] switching absorption arrangement which the railroads serving Portland are attempting to work out. I understand that the Peninsula Terminal Company is compensated by a division of the through rate, is it not, sir? A. Correct.

Q. But for the purpose of the absorption of the switching charges by the line-haul carrier, is that compensation paid to Peninsula Terminal Company treated as though it were just a switching charge? A. What switching charge are you referring to now?

Q. Let's take an industry located on Peninsula Terminal. Today it has its switching performed for it and no switching charge is assessed against the industry, is that right, sir? A. That's right at Peninsula Terminal.

Q. If this charge arrangement goes into effect as the president of the railroads have tried to agree on, and there must be, for example, a minimum revenue of $100 remaining to the line-haul carrier, is that right, sir? A. That's right.

Q. Then assuming that the Union Pacific brings a car into Portland, would it deduct from the revenues which it earns and the division which is paid to the Peninsula Terminal Company? A. No, sir.

Q. So that the Peninsula Terminal Company earns a portion of that revenue, it has no effect at all as to whether the Union [337] Pacific will or will not perform the service with no switching charge to the industry. A. That is correct.

Q. Now, if the Milwaukee should come to Portland and bring a car into Portland and give it either to the Union Pacific or the S. P. & S., it would have to pay a switching charge, would it not, sir? A. Yes.

Q. And also whatever revenue is paid as a line-haul division to the Peninsula Terminal would be taken out of the—strike that.

Whatever revenue the Peninsula Terminal receives would not be treated as part of the Milwaukee's revenue, would it? A. No, sir. You would have to absorb that.

Q. In this case, then, it is very possible, is it not, that by the time the Milwaukee paid either the Union Pacific or the S. P. & S. a switching charge that its revenue would fall below the minimum and the shipper would have to pick up the switching charge, is that not right, sir? A. The shipper could pick up the deficit if it was lower than the switching charge, he could pay the deficit.

Q. And in that situation, in your opinion, sir, it would not be very likely that the shipper would use the Milwaukee service if it meant an additional cost to the shipper, is that right, sir, assuming that by using the Union Pacific, for example, he [338] could avoid such charge? A. I can't see where this minimum hundred dollars is going to come into play too often. Anything less than that certainly they would use your service as well as ours.

Q. Yes, but wherever that does come into operation it is not likely, is it, that the shipper would use the Milwaukee route if it cost them more money than by using the Union Pacific's route? A. Yes, that could be true.

Q. You indicate, sir, on the bottom of page 2 of your statement that "applicants propose to maintain the present rail rate-making policies and permit those line-haul carriers not having a physical interchange with the Peninsula Terminal Company at North Portland, Oregon, to reach industries on the latter's line through joint rates or routes to the same extent as such rates and routes exist today." I am not sure just how much you are operating there, Mr. McIntosh, if you keep the rates on the same basis as they are today and the Union Pacific decides to make a reduction in its rates in the future. That doesn't guarantee that the Milwaukee would be able to participate in that traffic in the future, does it? A. I don't understand your question.

Q. If you maintain in connection with your connecting lines the rates and routes that are in effect today, then how would the Milwaukee be able to compete against the Union Pacific should [339] the Union Pacific elect to reduce rates over a single line route? A. From what points are you speaking? You have the same right to make rates on your own line as we do. I answered this question for Mr. Wilson, what the rate-making policy is.

Q. Let's look a minute, Mr. McIntosh, if we have a joint rate with the Union Pacific we can't bring the traffic to Portland, can we, if it is going to a Portland terminal industry? A. That's correct.

Q. There wouldn't be any joint rate that would apply via Portland, would there, where we would interchange it to you in Portland? A. No, not today there isn't.

Q. It would have to be perhaps Omaha, Nebraska, is that right? A. You are speaking of the "C" traffic, it could be Omaha, it could be Marinco, of course with certain restriction of routing on the "C" origin lines or destination.

Q. There would be certain restrictions. The only wide open junction would be Omaha, would it not? A. Correct.

Q. Assuming we had our choice, then, of giving up certain traffic to you at Omaha or bringing it into Portland, even to get our haul as far as Omaha you would have to reduce the joint rates the same as you would a single-line rate, is that right, sir? [340] A. That is about right. We have established rates today. I can't understand what you are asking.

Q. Well, we have the rates today and they are competitive, are they not? A. Yes.

Q. But if in the future you maintain the rates as they are with your connections but they change them as they are for you, let's take the rate up from the State of Washington

into Oregon for the movement. We would have an interchange with you at what point, sir? A. Chehalis and Marinco.

Q. Chehalis and Marinco. A. Also in Tacoma in some instances.

Q. You would have—let's take a movement from Spokane, is that a good point, to Portland. The Union Pacific could provide a single-line service, could it not, sir? A. That's correct.

Q. And if you elected to reduce your single-line rate over the Union Pacific and you met your commitment here to maintain the rates and routes in connection with the Milwaukee, the Milwaukee has become noncompetitive, has it not, sir? A. No, sir, I would not say that. You have the same right to establish the same rate as we have. That is true in all this rate making. Take these competitive points, you have met all the rates that have ever been published or posted.

[341] Q. You are holding out this inducement to the Milwaukee that you will maintain these same rates and routes with the Milwaukee that you have in effect today? A. That's right, and these same rates and routes that we have in effect with the Milwaukee today out of Washington are to points that are noncompetitive to your line.

Q. Do they apply out of Spokane, sir? A. No, sir, no competitive points.

Q. Are there any points where the Milwaukee and the Union Pacific have joint rates from common origins to Portland? A. Not to my knowledge in the Pacific Northwest.

Q. You know of none, sir? A. No.

Q. Do you hold yourself out, however, to make the same reductions via joint-line routes that you would make via single-line routes in the future, Mr. McIntosh? A. I don't understand your question.

Q. If you have a single-line rate via Union Pacific from origin to destination, the origin is served by the Milwaukee road, are you willing to join in any joint-line rates on the same reduced rate basis from those origins to industries on the Portland terminal? A. Those are not from a—

Q. (Interrupting) Excuse me just a minute. Would you make that on the Peninsula Terminal instead of Portland terminal? [342] A. Not from any competitive station.

Q. So you are not holding out any hope that the Milwaukee would be able to participate in such joint-line rates in the future, are you, sir? A. You wouldn't participate from competitive stations. You would publish your own rates from these competitive stations to Portland and you would reach the Peninsula Terminal Company through the absorption of switching charges.

Q. It is true, is it not, that the railroads in publishing rates must justify them costwise? A. Yes, sir.

Q. And is it generally true, sir, that you incur additional costs as more intermediate carriers are required in the movement? A. You say you acquire additional cost. Your revenue becomes less when you divide the revenue.

Q. And the more interchanges that must be made, interline switching, of course, generally the higher the costs are also, is that right? A. That's correct.

Q. So if the Milwaukee does not directly reach the Peninsula Terminal Company, would not the Union Pacific have generally a cost advantage over the Milwaukee in publishing rates so that it could justify in some instances lower rates than the Milwaukee could publish, is that possible, sir? [343] A. Are you speaking from competitive points?

Q. Yes, sir. A. I will say again, you will join in rates from competitive points and you always have.

Q. I am asking you, sir, is it possible that the Milwaukee's costs may be higher than the Union Pacific's for the same type of haul from the same origin to industries on the Peninsula Terminal? A. Yes, your costs would probably be higher.

Q. If we do not reach the Peninsula Terminal railroad directly. A. Yes.

Q. I believe on the last page of your statement, Mr. McIntosh, you say in the last sentence that the Milwaukee and the Southern Pacific should only be permitted to participate in traffic from or to these industries through present or proposed rate application, which is the recognized rate-making method of all rail carriers not physically serving any respective area. Do you have in mind there that we should only reach these areas through joint rates with the carriers that actually reach the Peninsula Terminal railroad? A. Yes, sir.

Q. And this is a recognized rate-making method of all rail carriers not physically serving any respective area according to your statement— A. (Interrupting) Yes, sir. [344] Q. The S. P. & S. does not physically reach Terminal 4, does it, sir? A. Yes, they have rates applying to Terminal 4.

Q. Yes, I say do not physically reach Terminal 4. A. They do not switch it.

Q. They do not physically serve that are, is that right, sir? A. They serve that area, yes. They have rates there.

Q. Physically serve the area, Mr. McIntosh. A. What do you mean by physical?

Q. They do not operate in or out of Terminal 4, do they, sir? A. No. We do the switching at Terminal 4.

Q. In other words, you don't require the S. P. & S., then, to reach Terminal 4, only by publishing and joining in joint rates with the Union Pacific, is that right, sir? A. They have rights out there.

Q. And that is the way a railroad can protect itself against having to join with another carrier in joint rates is by having its own rights, either trackage rights or its own line, as the case may be, to reach that area itself, is that right, sir, that is how a railroad can protect itself against having to join with another carrier in joint rates and be subject to the willingness and cooperation of that carrier in establishing joint rates? A. Well, all railroads desire to protect their own respective territories where they have industries. It is our policy that [345] we should have joint rates instead of invading each other's territory.

* * *

Q. (By Mr. Merrill) Does this mean that the Union Pacific then is willing to join in joint rates with the Milwaukee from all origins to and from Peninsula Terminal Company? A. Many origins in the Pacific Northwest we will negotiate joint rates with you.

Q. You will negotiate or join with us? A. We have rates with you today.

Q. From noncompetitive origins only. A. Yes.

Q. Do I understand it would be your policy to liberalize your joint rate structure here so that the Milwaukee could join with the Union Pacific in joint rates from all origins in the Pacific Northwest? A. Noncompetitive origins with your line we have joint rates today and we are willing to negotiate rates where we do not have rates.

Q. And you are willing to negotiate from the other origins? [346] A. Noncompetitive origins.

Q. Noncompetitive origins you are willing to negotiate. A. Yes.

Q. And this, however, would exclude the Milwaukee from joint rate participation from major points in the Pacific Northwest, would it not, such as Spokane, Seattle, Tacoma? A. Yes, from competitive points it would.

Q. As a matter of fact, sir, when the Union Pacific decides whether or not it will enter into a joint rate it considers its own interest very prominently, does it not, as to whether or not it will permit the Milwaukee to join with it in a joint rate? A. It considers the interest of the shipper.

Q. You consider your own interest as well, sir? A. Certainly, we consider everybody's interest when we are negotiating a rate.

Q. And to the extent that this might divert traffic from the Union Pacific to the Milwaukee or short haul the Union Pacific, this would be a factor that would have strong bearing on whether the Union Pacific would enter into such a rate, is it not? A. No, sir. A short haul, I don't understand what you mean by short haul. We negotiate a rate from a noncompetitive point, on your line we have established junctions where these rates and routes apply. If it originates on your line, we have an established route via Chehalis and you get your long haul and we [347] get our short haul.

Q. What you are saying, Mr. McIntosh, is you don't conceive any possibility of joining with the Milwaukee in any joint rates from competitive origins to or from Peninsula Terminal Company, is that right, sir? A. Right to the same extent you join with us in rates and rights from competitive origins, to competitive origins.

Q. At the present time we wouldn't have any power to join in rates where we would deliver to or from Portland because we don't reach there, Mr. McIntosh, is that right? A. Right, you don't reach Portland.

* * *

Q. (By Mr. Crabtree) * * * Can you tell us whether line-haul rates of the carriers serving Portland apply to the industries on Peninsula Terminal Company? [348] A. Yes.

Q. Does that not in effect amount to an absorption of this charge, this $29.25? A. Yes.

Q. Mr. McIntosh, on page 3 of your testimony you refer to the agreement between the presidents of the railroads. Can you tell us what, if any, effect this agreement between the presidents has on that $29.25 charge? A. Are you through with your question?

Q. Yes. A. It will have no effect on the $29.25. It will have no effect. The railroads still serving the industry on Peninsula Terminal will absorb the Peninsula Terminal division.

Q. Mr. McIntosh, on shipments of lumber intrastate from southern Oregon, say, to Peninsula Terminal Company, is there a switching charge on such shipments? A. If there is no joint through routes there is a switching charge.

Q. We couldn't hear you. A. If there is no joint through route there is a switching charge.

Q. Do you know whether the revenues of such a shipment would permit the absorption of those switching charges under this $100 minimum that you mentioned at the bottom of page 3 of your testimony? [349] A. Normally on lumber it would load heavy enough that it would.

Q. And the same question regarding grain shipments from eastern Oregon, do you know what the situation would be there as far as the $100 minimum is concerned? A. Grain shipments from eastern Oregon, this proposed switching study will not come into play as we have joint rates with the northern lines. In other words, their rates that apply into Portland also apply to industries on our line and Albina where grain terminals are which they cannot reach directly.

* * *

FURTHER CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. McIntosh, do you consider that Rivergate is Union Pacific territory? A. Yes, it is located on our line.

Q. And that is the basis, then, for your objecting to the Southern Pacific or the Milwaukee reaching Peninsula Terminal because Rivergate is U. P. territory. A. Yes, sir.

[350] Q. All right. Now I want to make sure you didn't misspeak yourself in answer to a question when you indicated that the line-haul rates apply to Peninsula Terminal. That is not a fact as to all line-haul rates, is it, sir? A. As to the fact where there are established rates, yes.

Q. Isn't it a fact that there are line-haul rates from points in Oregon on the Southern Pacific which do not apply to Peninsula Terminal? A. That's true, yes.

Q. So you didn't mean to convey by your previous answer that all line-haul rates apply to Peninsula Terminal. They do not, do they? A. No, sir.

* * *

REDIRECT EXAMINATION

Q. (By Mr. Weisser) Mr. Wilson just asked you whether line-haul rates apply to Peninsula. If a line-haul rate did not apply to Peninsula Terminal is there a means of getting the traffic to Peninsula without assessing an extra charge to shippers? A. No, sir.

Q. Isn't there a switching tariff, a switching charge? A. That is an extra charge.

Q. Is that passed on to the shipper or absorbed by the line-haul [351] carriers? A. Passed on to the shipper. If the connecting line-haul rates do not apply to North Portland there would be a switching charge that would be passed on to the shipper consignee or consignor.

Q. Maybe I misunderstood your direct testimony. I thought you said as it stands now there are no charges passed on to shippers that go to Peninsula Terminal. A. I am speaking of Peninsula Terminal Company's division.

Q. What about a switch charge that would be assessed either S. P. & S. or S. P.? Have you determined whether or not any shippers at Peninsula are required to pay switch charges for that? A. I have never heard of a shipper of Peninsula Terminal paying a switch charge to my knowledge.

Q. Traffic is moving, then, on joint through rates to Peninsula, is that right? A. Generally full-line rates on commodities being handled in the Peninsula Terminal area to points on the S. P. in Oregon.

Q. In Oregon. A. Yes, but if it happened to be a commodity where there was not a published joint through rate, then there would be switching charges assessed.

Q. Now just so I get this straight then, your answer to the question of Mr. Wilson whether or not all line-haul rates apply [352] to Peninsula Terminal, this may be true but those rates on which traffic is moving do apply to Peninsula Terminal. A. Yes. We have through joint rates with the S. P. from points in Oregon to industries from or to industries on Peninsula Terminal Company covering commodities they handle. There could be exceptions, there may be some commodities where there are not joint through rates.

Q. If a shipment develops or movement develops, would it be the policy of the carriers to afford the same type of rate making to commodities presently moving?

Q. (By Mr. Weisser) Union Pacific, S. P. & S. and Peninsula Terminal. A. Are you speaking of joint rates now?

Q. Yes. A. We have negotiated with the S. P. on many occasions establishing rates to and from North Portland, to or from the Rivergate area.

Q. Now, concerning the $100 minimum that Mr. Merrill inquired of, if Union Pacific on a direct haul has a level of revenue which is a hundred dollars or less itself, would there be any switch charge passed on to a shipper on the Peninsula Terminal? A. No, sir. If the revenue is less than a hundred dollars we deliver the shipment to Peninsula Terminal.

Q. And would absorb Peninsula Terminal switch charge. [353] A. Yes. Peninsula Terminal is not involved in this Portland switching study.

Q. So the switching study and the criteria that you have listed here would not apply to the $29.25 charge that Peninsula assesses and is absorbed by the line-haul carrier. A. That's right.

Q. Now, if the Milwaukee is afforded access into Portland under the Northern Lines merger it will become a single-line carrier to Omaha, Chicago and a number of points east of here, will it not? A. Correct.

Q. In fact, it will be in a position to take the lead in rate making, would it not, on those common points? A. They would. Their rate officers would join in the committee, the Transcontinental Freight Bureau and have the same rights and say in making rates as any other line.

Q. They presently do from other points where they serve transcontinentally. A. Yes.

Q. You were asked a question also as to costs involved in handling traffic. The costs of course vary with the level

Mr. Wilson: Which carriers?

of traffic, do they not? A. That is right.

Q. So, if the Milwaukee were attempting to switch a car into North Portland, this cost would naturally be somewhat higher [354] then, than, say, a train of S. P. & S. traffic which maybe had twenty or thirty cars? A. Yes.

* * *

[355] "Question: I will ask you from your knowledge as to whether the rate-making policies of the Milwaukee and the Southern Pacific with respect to joining in joint through rates from competitive and noncompetitive points or refusing to join in those rates that you described with respect to the Union Pacific is the same or any different than the policy of your company.")

A. I would say their policy is similar. We will negotiate rates from noncompetitive points. In some respect they may not join in it.

Q. (By Mr. Tjossem) What I am getting at is this, Mr. McIntosh will the Southern Pacific as a matter of policy, for example, join with your company in making a joint rate over some junction from a competitive point to and from competitive points equal to their single-line rate?

* * *

[356] Q. (By Mr. Tjossem) Yes. A. They wouldn't join us in rates from competitive points.

Q. They would not? A. They would not. Same as our policy.

Q. Is the Milwaukee's policy the same as the Southern Pacific policy? A. Yes, sir.

* * *

[362] A. O. BARTELL
was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Weisser) Would you state your name, sir. A. My name is A. O. Bartell.

Q. And you are the owner of the Serendip Industrial Minerals of Portland, Oregon, are you not? A. Yes.

Q. Have you prepared a statement for this proceeding? A. Yes, I have.

Q. And this has been marked as Exhibit 31, Mr. Bartell. The Examiner I believe has the original there and I believe you have a copy or perhaps even the original of the carbon from which this was Xeroxed before you, do you not? A. Yes, I do.

Q. Is this your statement in this proceeding? A. Yes, it is.

Q. Are the facts contained therein true to the best of your knowledge and belief? [363] A. They are.

Mr. Weisser: I would offer Mr. Bartell for cross-examination, Mr. Examiner.

CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Bartell, my name is Wilson representing the Southern Pacific Company. A. How do you do.

Q. Can you indicate to me, sir, what you intended to convey to the Commission by the words "sympathetic service"? A. I will cite a specific example. Recently we had a car come in with wood chips on the top of the car. Instead of having a lot of trouble with it I went over to Bill Kavet. I said, "Come and look at my car." He came over and looked at it. He said, "I will see that you get paid," and I was promptly paid, and this is what I call sympathetic service

Q. Am I correct, sir, since your shipments are received from the north of Portland, the states north of Portland, that you have very little use for Southern Pacific service moving south into the California area, is that correct? A. None.

Q. So it makes no difference to you whether or not Southern Pacific has direct access to Peninsula terminals since you do not use their services. Is that a fair statement? A. Except that I would like to deal with the people with whom I do business that I am a customer of.

[364] Q. So if you, on the other hand, were a shipper shipping to points to or from Southern Pacific points, your position would be that you of course would want to have Southern Pacific in there. A. That's correct.

Mr. Wilson: Thank you. That's all, sir.

CROSS EXAMINATION

Q. (By Mr. Ploeger) Mr. Bartelt, I am Warren Ploeger attorney for the Milwaukee Railroad. A. How do you do.

Q. Could you tell me where your supply of rocks in Canada come from. A. Oliver, British Columbia.

Q. Via what route do they move? A. I believe that moves in general on Great Northern.

Q. Where is Oliver? Is it on the Canadian Pacific? A. Yes, I believe it is. I am not too familiar with the rail lines up there so I can't answer you knowing the facts.

Q. And you don't know whether that comes via Vancouver, New West Minister and Great Northern to Portland? A. I don't remember, no, sir.

Q. Do you have any movement in here by the Northern Pacific from Canada? A. It could be. As I say, I don't recall the line that that comes on. It could be N. P. from Oliver, it could well be.

[365] Q. Does any move in on the Union Pacific? A. No, but I anticipate a movement.

Q. From where? A. It will come out of Idaho.

Q. And you say also you have rock from points in north of Spokane in the State of Washington. Where is that. A. From Northport, Washington, and Chewelah, from Addy and Meade.

Q. Are those all points on the Great Northern? A. Yes, sir.

Q. Do you ever have any rock come from points like Metaline Falls? A. No.

Q. If there should be locations on the Milwaukee Railroad from which you could draw rock and the Milwaukee served Portland, would you like to have the Milwaukee also have an interest in this Peninsula Terminal and give you direct service? A. If this were true, but there is nothing in the foreseeable future that would change my present position.

Q. You mean that is just because there is no present movement from a point on the Milwaukee that you know of. A. Correct.

Q. Do you know as a fact that if the Milwaukee comes to Portland it will also have a connection with the Canadian Pacific at Sumas? [366] A. No, I do not know that.

Q. And give direct service to Portland, you didn't know that? A. No, I did not.

Mr. Ploeger: I have no further questions, Mr. Examiner.

Exam. Shoup: Mr. Green

Mr. Green: No questions

Exam. Shoup: Any further questions of this witness?

(No response.)

Exam. Shoup: The witness is excused. Thank you for appearing.

(Witness excused.)

* * *

[373] NORMAN E. FORTIER
was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Young) Would you please state your full name and spell your last name, please? A. Norman E. Fortier, F-o-r-t-i-e-r.

Q. What is your business address? A. 5200 Northwest Front, Portland, Oregon.

[374] Q. Who is your employer? A. Oregon Steel Mills.

Q. In what capacity do you serve the Oregon Steel Mills? A. I am their traffic manager.

Q. Does the Oregon Steel Mills have a plant in Portland, Oregon, at this time? A. Yes, sir.

Q. Where is it located? A. At 5200 Northwest Front.

Q. Do you propose to locate another plant in the Portland area? A. Yes. We have 150 acres in the Rivergate Industrial District,

Q. Is that being constructed, that plant, at this time? A. It is in the process of construction, yes.

Q. What will be manufactured at that plant? A. The first phase is a steel plate rolling mill.

* * *

[375] Q. Mr. Fortier, is this the first steel plate mill in the entire Northwest? A. Yes, sir.

Q. Why did you locate at Rivergate? A. Well, it had a lot of expansion room. It is the center of a transportation hub, both rail transportation. It had lots of room for other industries nearby hopefully that will use steel plate.

* * *

[376] Q. Is your company related to another company, affiliated with another company in any way? A. We are a division of Gilmore Steel Corporation of San Francisco.

Q. Does Gilmore Steel Corporation have its own iron ore deposits? A. Yes, sir. We own the Shasta iron ore deposit at Shasta Lake in northern California.

Q. That is the Mount Shasta area? A. Yes.

Q. And that is adjacent to what railroad? A. Southern Pacific.

Q. Does Gilmore plan to mine the ore in its deposit at Shasta? A. Yes, as soon as it is economically feasible to transport it.

Q. How will that iron ore be shipped? A. Well, the only feasible way or the only economic way to move iron ore is to move it in trainload lots, unit trains they are called.

* * *

[377] Q. Do you support Southern Pacific Company in its application to get direct access to Rivergate? A. Yes, we do. We feel this is the only way that this unit train, principle is practical. In order to get ore from the Shasta deposit to Rivergate, it is imperitive that the Southern Pacific get into Rivergate.

Q. What other advantage will there be to the public and to your company if the S. P. application is granted? A. Well, as a large shipper and receiver we can't tolerate any delays in receiving or in shipping. As a, you might say as a citizen of this community, this Rivergate area has been developed by public tax money, and I personally feel that all railroads should have access to this area.

* * *

CROSS EXAMINATION

Q. (By Mr. Weisser) The Examiner has a map. It has been identified as Exhibit 37 for identification. I think to clarify the record, could you point out where your plant is being located in Rivergate? [378] A. Yes, sir. It would be at approximately No. 27.

Q. Approximately No. 27? A. Yes.

Q. Do you know where Peninsula Terminal Railroad is? A. Yes, sir.

Q. Is it your testimony, then, that you believe the unit trains will move through Peninsula Terminal Railroad to your plant? A. Eventually when—of course there would have to be an extension of track, of course.

Q. I see. You realize, of course, that there is substantial work that would have to be done in that area to fill and prepare the land, do you not? A. That is true.

Q. Do you have any idea when that might be completed? A. I am not aware of it, no.

Q. Do you know of any timetable that has been set to get the track in the Peninsula—strike that—in the Rivergate Industrial area on the ground and operating? A. No, sir, I am not aware.

Q. Will your plant be served by any railroad when completed? A. Yes; by the Union Pacific.

Q. I see. And this would be through their Barnes Yard? A. Yes.

Q. And you could route your traffic via Southern Pacific, [379] thence Union Pacific to your plant? A. That is true.

Q. A unit train could be routed that way, could it not? A. It could be, but it would be uneconomical.

Q. How is that? A. We have made some preliminary investigations in this area and the Southern Pacific in informal talks have offered to docket a proposal to publish rates on iron ore in unit train load lots from the Shasta deposit as far as they can take it to Portland with their current junction with Union Pacific. Subsequent talks with Union Pacific have indicated that they would add to the cost of this transportation to the point where it is not economical at this time.

Q. With whom were you talking at Union Pacific? A. Your rate department, sir.

Q. Who specifically? A. Excuse me, I didn't personally. This was handled by the Southern Pacific on our behalf.

Q. I see. So Southern Pacific told you that Union Pacific made this representation? A. Yes, sir, and it was verified with talks with their rate people here in Portland.

Q. With whom in Portland, do you know? A. Sir, I can't—I don't have that name with me. I could get it.

[380] Q. The traffic department in Portland? A. Yes.

Q. In the rate department? A. The rate department in Portland, yes.

Q. Do you know exactly what the Union Pacific proposal was? A. In dollars and cents?

Q. Yes. A. Yes. These were, of course, informal talks and they would have to be put on a docket. They offered 23 cents per gross ton to take the iron ore in unit trains from the interchange of the S. P. to Rivergate.

Q. Other than that, there is no operating impediment that you could see to Southern Pacific giving unit trains being operated by Union Pacific out to your plant, is there? A. Only with respect that the unit train principle, as generally known, indicates it is a one haul from origin to destination, a round trip affair.

Q. Are you familiar with the run through trains that Southern Pacific and Northern Pacific operate between Seattle and Eugene? A. No, sir.

Q. Where crews are merely changed when they get into Portland and the same power is operated from one terminus to another? A. I am not aware of that, but the Union Pacific indicated they could not do that in this instance.

[381] Q. Who told you that? A. Again the same people that we were discussing the rate and operation with at that time.

Q. What was the substance of their conversation? A. The Union Pacific, because of their union agreements, would have to take their power and their crews and attach it to the train and bring it into Rivergate. This is just a matter of a short time. They would also have to pay them minimum time for their crew.

Q. The discussion we have had here as to unit trains and the problems you have run into have dealt with the southwest end of Rivergate where your plant is coming in, is that correct? A. That is correct.

Q. You indicated that the unit trainload lots of ore would be handled as soon as economically feasible. Is there some other factor in the mining of this that makes it unfeasible at this time? A. No, this was strictly transportation.

Q. Just to get this one point straight as to the effect this unit train may have on Peninsula Terminal, is it your testimony that the unit trains would operate over the existing trackage of Peninsula Terminal if they were to come out to your plant via S. P.? A. Well, whatever is necessary to get the S. P. into Rivergate. That is a technical railroad question. I am not sure [382] how that would have to be handled, but it would have to be over whatever arrangement the S. P. could make to get into Rivergate.

Mr. Weisser: That's all.

CROSS EXAMINATION

Q. (By Mr. Tjossem) I am Paul Tjossem representing the S. P. and S.

When did your company commit itself to buy this 150 acres out at Rivergate? A. I cannot answer that accurately, sir.

Q. Was it last year? A. It was within the last couple of years.

Q. At that time had you consulted with the Southern Pacific as to whether they could put a unit train into that location? A. This came after, sir.

Q. After you committed yourself to buy the plant? A. Yes.

Q. You said you were familiar with the Southern Pacific's application in this proceeding for trackage rights on the Union Pacific? A. In a general way, yes.

Q. Are you aware of the fact that those trackage rights run from East Portland through the Union Pacific Albina Yards up on the Union Pacific's track to a connection with the Peninsula Terminal Company? [383] A. Yes, sir.

Q. So if that application is granted and you were going to run a unit train, you would have to run it through Peninsula Terminal, wouldn't you? A. Apparently so.

Q. Have you any idea as to when it will be that the Peninsula Terminal trackage could ever be extended in to your plant? A. No, sir. That is a railroad problem. I am not aware of it.

Q. You have not investigated that? A. No, sir.

Q. If you could get the rate that you needed, when would you put this unit train into operation? A. That is not known at this time. We currently have a contract with the Marcona Company to bring iron ore in by water. We are still actively progressing to using our own ore from the Shasta deposit.

Q. Where is this water-borne iron ore coming from? A. From Peru.

Q. So your investment of $35,000,000 in this plant is predicated on a source of iron ore from Peru for the present? A. That is correct.

Q. How long will that ore be available, do you know? A. I don't know that, sir.

Q. But you have made no investigation at all to determine [384] how soon or when it could be that unit trains could operate through Peninsula Terminal to your plant if the Union Pacific appplication was granted? A. No, sir. Our original investigation, of course, was as it is known now, S. P.—U. P. into Rivergate.

Q. What was the quotation the Southern Pacific gave you for the move from the Shasta mine up to East Portland? A. You understand this was informal talks, that they offered only to docket this on a, in a regular manner.

Q. But you had a definite quotation of 22 cents a ton from the U. P. What did the Southern Pacific give you? A. Three dollars and eighty-five cents a gross ton from Shasta to the Union Pacific interchange in Portland.

Q. Under that quotation was the S. P. going to furnish the equipment? A. Yes, sir.

Q. And furnish the transportation? A. Yes, sir.

Q. And all the terminal services at Shasta? A. Yes, sir.

Q. How many miles is it from Shasta to East Portland, do you know? A. I don't have that with me, sir.

Q. Your discussions, I take it, with the Union Pacific were also informal? [385] A. Yes, they were, and handled through the Southern Pacific because they were the ones we went to originally.

Q. But I understood that you did talk to somebody directly with the Union Pacific? A. Yes, subsequently we did talk with them.

Q. And that was in the Union Pacific rate department? A. Yes.

Q. About when was that, do you know? A. A year ago.

Q. Did the Southern Pacific tell you they would take this iron ore clear into your plant if they could obtain the rights from the Union Pacific? A. Not at that time, because there was no mention at that time of any way of getting them into Rivergate.

Q. So the Southern Pacific didn't indicate to you that they would try to bring this ore through Peninsula Terminal? A. Not at that time, no.

* * *

[387] RICHARD B. KENNEDY

Was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Weisser) Mr. Kennedy, have you prepared a statement for this proceeding? A. Yes, sir.

Q. Your name is Richard B. Kennedy, it is not? A. Right.

Q. You are with the Morrison Oil Company? A. That is correct.

Q. You have a plant located on the Peninsula Terminal Railroad in North Portland? A. That is correct.

Q. And the statement which is attributed to you has been marked as Exhibit 34 in this case and I hand you what is a copy of that and ask you to take a look at it. Based on your examination of that statement could you tell me if that is your statement for this proceeding? A. Yes, this is my statement.

Q. Are the facts contained therein true and correct to the best of your knowledge and belief? A. That is correct.

[388] Mr. Weisser: I tender Mr. Kennedy for cross examination.

CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Kennedy, my name is Wilson, sir, with the Southern Pacific.

You indicate on Page 2 of your 34 for identification that with the ownership in Peninsula the U. P. and S. P. and S. should help develop new markets. Would you agree with me that it would be logical that those new markets would be served by Union Pacific at other portions of their line? A. Yes, I would think so.

Q. It is in their own self-interest and obviously they would attempt to get the haul direct from Peninsula Terminal direct to some point on their own lines throughout the United States, isn't that a fact? A. Well, by the nature of our business we are restricted, let's say we feel the Greater Northwest Territory, Montana, being probably the limits of our being able to compete.

Q. I was referring, of course, to the Union Pacific. You would agree with me it would be in the Union Pacific's self-interest as a railroad to develop these new markets you refer to on the Union Pacific if they could in other states so that they could move the shipment all the way from Peninsula Terminal direct by their own lines to those new markets, would you agree with that? A. Of course we work with the S. P. and S. primarily. Those [389] are the people that handle our cars and if we have any problems we go to them first and let them work it out with someone else

Q. Well, are you able to agree with my statement? A. Well, in essence, I guess, yes.

Q. Would you agree with me that—I will withdraw that. Do you agree where the Southern Pacific Company operates, sir, their system? A. Roughly. I know they are the coast, let's say the coast-wise carrier.

Q. Yes, they run south from Portland into California and into Arizona and across New Mexico, Texas, Louisiana, all the way to New Orleans, do they not? A. To my knowledge, yes.

Q. Do you think the Union Pacific would have any great interest in developing new markets in those areas served by the Southern Pacific in Arizona, New Mexico, Texas, and Louisiana since all they would receive would be a switch movement from Peninsula Terminal to East Portland? A. I wouldn't think they would be too interested.

Q. No; I agree. Now, at the top of that Page 2, Mr. Kennedy, you indicate since the present owner of Peninsula is not permitted to continue this service, since the U. P. and S. P. and S. are in the railroad business, that is their stock and trade, they would be able to do a good job. Were you [390] aware of the fact that the contract of purchase between Peninsula Terminal and the U. P. and the S. P. and S. provides that the Peninsula Terminal management will continue to manage the Peninsula Terminal Railroad? A. Yes, sir.

Q. You were. Do you know why they done that? A. No, sir, I do not know the reason.

Q. It would appear to you from, I take it from your statement that it would be more logical since they are in the railroad business and that is their stock and trade that they would take over the management of Peninsula Terminal themselves, isn't that what you are saying here? A. No, I wouldn't agree. Let's say maybe they might help in the matter. We would hope that the present people would stay there because we know them.

Q. Now, I understand you receive inbound shipments in your business, is that correct? A. That is correct.

Q. Some of those origins are in California, are they not? A. That is correct.

Q. And they move in Southern Pacific and thence Union Pacific into your Rivergate area or the Peninsula Terminal area? A. That is correct.

Q. You had some shipments in October of last year, did you not, in 1967, inbound shipments, one from Ravenwood, Cali- [391] fornia, a shipment of cans? A. Oh, yes, we receive regular shipments of cans from that area.

Q. Would it surprise you, sir, if I were to tell you on the 10th of October last year you had a shipment of cans that moved on the 10th of October from Ravenwood, California, routed S. P., S. P. and S., and that it took 45 hours to get from the point where Southern Pacific turns it over to the S. P. and S. to Peninsula Terminal? A. Would it surprise me that it took 45 hours?

Q. Yes, sir. A. No, because it is my understanding that it is normally three days to get an S. P. car out of Brooklyn Yard, so we are used to that, we have learned to live with that.

Q. I am not referring to that. I am referring to the 45 hours commences, is the time the S. P. turns the car over to the S. P. and S., the 45 hours begins then and ends when it is put on the interchange track at the North Portland interchange, would that surprise you? A.

Mr. Tjossem: Mr. Examiner, I want to interpose an objection in the way of clarification. I do not believe the S. P. hands cars over to the S. P. and S., I think they are handed to the S. P. and S. by the Portland Terminal Company.

Mr. Wilson: Are you objecting?

Mr. Tjossem: Yes, I am objecting because you are not [392] stating a fact.

Q. (By Mr. Wilson) Do you know how the cars are delivered? A. No, sir, that has always been a mystery to me. As I say, we work through the S. P. and S. and we

let them fight our battles. We say we have car number so and so and you are to deliver, go get it for us.

Q. Has the S. P. and S. ever told you these delays were accounted for by the S. P. and S. or is it always someone else? A. They have usually come back with an answer that they would get it as soon as they could get their hands on it.

Q. In any case, has the S. P. and S. ever told you that the delay took place on the S. P. and S.? A. I can't recall of any.

Q. In all cases it was always the other fellow hasn't given it to us, is that a correct characterization of the answers? A. I would go along with that. I would think that would be normal.

Q. Now, on the 23rd of October of last year you shipped some cans from Richmond, California, routes S. P.-U. P. to Peninsula Terminal, do you recall that, cans from Richmond? A. Yes.

Q. Would it surprise you if I were to tell you it took 37 hours from the time the Union Pacific received that car until the time it was spotted on the Peninsula Terminal interchange track? [393] A. Well, I do know this, when we ship tires out of Los Angeles we specify Western Pacific with S. P. and S. to speed up our service.

Mr. Wilson: I wonder if the reporter could read my question.

A. I know we originate it with Western Pacific.

Mr. Wilson: I would like to have my question read and receive an answer to my question if I might, Mr. Examiner.

Exam. Shoup: You may.

Please read the question.

(The record was read by the reporter as follows:

"Question: Would it surprise you if I were to tell you it took 37 hours from the time the Union

Pacific received that car until the time it was spotted on the Peninsula Terminal interchange track")

A. I would have to answer yes, it would surprise me then.

Q. (By Mr. Wilson) And as a shipper or receiver, in this case a receiver, you would not consider that an adequate service for the distance of 5.2 miles, would you, sir? A. It does not seem that it would appear so.

Q. Did I understand you that it is your understanding that the Western Pacific serves Los Angeles, California? A. We have routed tires, in other words, they come the inland route rather than—

Q. They come the Bieber route? [394] A. I am not too familiar with that. I know it is about four carriers.

Q. But you don't believe that the Western Pacific serves Los Angeles, do you, sir, or do you know? A. It originates with another carrier but Western Pacific brings it up.

Q. Who brings it into Portland on that route? A. S. P. and S.

Q. And who would bring it or move it before S. P. and S. got it between the Western Pacific and S. P. and S., do you know? A. Is it the Oregon Trunk?

Q. I am just asking you if you know. If you don't know, say you don't know. A. Well, I can look at the routing sheets.

Q. But you are not able to tell me now? A. No.

Q. O. K. Just one last question, Mr. Kennedy. Can you explain to me how you believe the Peninsula Terminal will be strengthened by virtue of U. P. and S. P. and S. ownership? A. Well, I think I indicate we are perfectly satisfied with the services of Peninsula at the present time but if they are desirous of making a change, which they evidently are, we feel because of our being able to work with S. P. and S., which we have for many years, that we would prefer them to be in the ownership.

[395] Q. Actually Peninsula Terminal has really performed extremely well on the time that it takes from the time a car is spotted on the North Portland interchange until the time they deliver it to your plant or other plants on the Peninsula Terminal, isn't that true. A. Yes, sir.

Q. Actually the service could hardly be improved upon as far as a shipper or receiver on Peninsula is concerned, isn't that true? A. I would say so.

Q. Now, how close is your plant to the Rivergate area, sir? A. Well, we, I would think, are the outskirts of the Rivergate area.

Q. In other words, Peninsula Terminal runs right up to the Rivergate area, does it not, sir? A. To my knowledge, that is correct.

Q. If you were a shipper in the Rivergate area, don't you believe that all the railroads serving Portland should have direct access to the Rivergate area? A. Well, I am not a railroad man primarily, however, in our business, the less number of people you have to go through the faster you get the action done.

Q. Yes, I agree with you. So if the Southern Pacific had direct access to Peninsula Terminal there would be one less person that that traffic would have to go through, isn't that [396] true? A. It would, yes. Well, that—that they don't, unfortunately, have access in there and I don't think they are going to participate in there.

Q. You understand that is not why we are asking for here is the right to operate over the Union Pacific trackage to get that direct access and eliminate that extra person that we have to work through. Do you understand that in this proceeding? A. [illegible]

Mr. Wilson: Thank you. That's all I have.

CROSS EXAMINATION

Q. (By Mr. Ploeger) I am Warren Ploeger with the Milwaukee Railroad.

This operation you have at Morrison Oil, do you warehouse on behalf of others the oil in packages? A. No, sir, we don't. We package for other people.

Q. You don't own the oil or the brake fluid or— A. (Interrupting) Oh, yes.

Q. Are you a custom packager? A. That is correct.

Q. Do you buy the materials and then package it and sell it or do you store it? A. We do it both ways.

Q. Do they buy the oil and turn it over to you and you package [397] it and then they sell it? A. As I say, we can go either way. We own some products and sell it or we use or will receive their product, package it for them.

Q. What product do you in particular buy and sell? A. Motor oils, antifreezes, brake fluids.

Q. All of it? A. Right.

Q. What of these commodities do you package on behalf of others? A. By that do you mean someone else's product where we do not take title to it?

Q. Yes. A. Antifreeze and motor oils.

Q. Is that the bulk of your business, rail shipment-wise? A. Right, sir.

Q. So that on that traffic that you store, warehouse, and package for others, do they direct the routing both on inbound and outbound traffic, do they not? A. Normally on the inbound they do; on the outbound it is very often left up to us.

Q. They might leave it to your judgment but they have the right to tell you how to do it? A. They do have that right.

Q. I take it on your outbound commodities most of it moves [398] out into the Northwest territory by truck, is that correct? A. A considerable portion, but there are some rail movements out, particularly into Washington and Montana.

Q. Primarily into the Butte, Missoula, and Billings area in Montana? A. That is correct.

Q. Do you have dealers or distributors there that you ship to? A. That is correct.

Q. They may be dealers, distributors of your customers or yours, which are they? A. They are our customers.

Q. So they direct the routings to those points? A. That's right.

Q. Do you know that if the Northern Lines are merged into one system, including the S. P. and S., that under the conditions imposed by the Commission in that merger that the Milwaukee would be granted trackage rights to Portland over the S. P. and S. track? Did you know that? A. I have read it, read that.

Q. Did you know that it would be possible for you to ship direct Milwaukee from Portland to Billings and Butte and Missoula and other places in Montana such as Great Falls if the Milwaukee is in Portland? A. I hadn't realized that but I would assume it to be true.

[399] Q. If this event comes to pass, would it be probable that you might recommend routing that way from time to time, if the service was equal? A. Well, we are a small company and we do not have a traffic manager, so I go back to my original statement that we normally pick the S. P. and S. to handle our traffic problems for us.

Q. However, on that traffic which your customers may route they may wish to route it that way, is that true? A. Oh, that's true

Q. Is it your understanding, however, that even though the Milwaukee will be running right past your door with their trains that they will not be able to serve the Rivergate or the Peninsula Terminal Company except in the same way they do now or to the same extent they do now unless their application in this proceeding is granted? A. Yes.

Mr. Ploeger: I don't think I have any more questions. Thank you.

Exam. Shoup: Any further questions of this witness?

Mr. Weisser: I had one question if it is proper for redirect now, Mr. Examiner.

REDIRECT EXAMINATION

Q. (By Mr. Weisser) Would you want Southern Pacific to be operating over Peninsula tracks to do switching along with [400] Peninsula to your plant? A. Would you repeat that?

Q. Would you want the service of Southern Pacific switching over the trackage of Peninsula Terminal to your plant along with Peninsula Terminal doing the same service?

Mr. Wilson: I will object to the question. That is not the relief that Southern Pacific has asked for in its application.

Exam. Shoup: Overruled. The Examiner is going to allow that question.

Mr. Weisser: Well, if counsel—well, I will let the question stand.

Exam. Shoup: Would you please answer the question.

A. I would think it would be a needless duplication. I think Peninsula could do the switching.

Mr. Weisser: I believe that's all the redirect.

Exam. Shoup: Are there further questions of this witness?

RECROSS EXAMINATION

Q. (By Mr. Wilson) Did the Union Pacific tell you that the Southern Pacific intended to operate its trains and do switching over the Peninsula Terminal Company tracks? A. No, sir.

Q. In other words, you don't know whether that is intended or not? A. No, sir.

* * *

[401] MAYNARD COCHRAN

was sworn and testified as follows.

DIRECT EXAMINATION

Q. (By Mr. Weisser) You have been sworn, Mr. Cochran? A. Yes, sir.

Q. Could you state your name? A. Maynard Cochran. I own a small manufacturing plant out in North Portland on the Peninsula Railroad, about two and a half years.

Q. There has been a statement marked as Exhibit 32 in this proceeding. I will hand you what is a copy of it and ask you to take a look at it. Is that a copy of your statement in this case? [402] A. Yes.

Q. Are the facts contained therein true and correct to the best of your knowledge and belief? A. To the best of my knowledge, yes.

Mr. Weisser: I tender Mr. Cochran for cross examination.

CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Cochran, my name is Wilson, with the Southern Pacific.

Am I correct from reading your prepared testimony, Mr. Cochran, that you do not ship over the Southern Pacific at the present time? A. I have on a piggy-back basis only.

Q. Is that inbound or outbound? A. Outbound.

Q. What destination are you shipping to? A. That goes to Los Angeles.

Q. And on Page 2 of your prepared testimony you indicate in about the third line that since you rely on the U. P. and the S. P. and S. for your line haul that you believe ownership of the switching carrier will insure continued good service. Is the good service that you refer to the service of the Peninsula Terminal Company? A. Well, yes, that and especially the S. P. and S. because we have been doing business with them for a long, long time.

Q. Well, that is what I want to make sure so we are talking [403] about the same thing. The Peninsula Terminal, as you know, is the small railroad that goes just to the North Portland interchange and there it is turned over to the S. P. and S. or U. P.? A. Yes.

Q. Now, the service you refer to in your statement here is the service of the Peninsula Terminal itself in picking the cars up at your plant and moving them to the North Portland interchange or in the reverse direction, is that correct? A. Yes, I think that would be correct.

Q. And you did not intend to refer to the service between the North Portland interchange and, let us say, Albina Yard or any other point on the Union Pacific? A. No.

Mr. Wilson: I think that's all I have. Thank you, sir.

Mr. Ploeger: Mr. Examiner, I thought I might ask him a question.

CROSS EXAMINATION

Q. (By Mr. Ploeger) I am Warren Ploeger with the Milwaukee Railroad.

I want to ask you what you meant when you say, on Page 1, "can foresee no need for an expansion of any of these routes." What did you have in mind when you said that? A. Well, every place I am shipping it is adequate right the way it is.

[404] Q. What expansion did you have in mind, then? A. Expansion of our own plant.

Q. What did you mean by expansion of these routes? A. No, I am talking about expansion of my own plant. We will have more cars later on.

Q. Do you want to change that testimony, then, I can foresee no need for expansion of my plant, is that what you mean to say? A. Well, we are going to expand our plant but we will stay with the same customers we have.

Q. Same customers? A. Yes, over the same routes.

Q. What I am asking you now, what do you mean by I see no need for expansion of any of these routes? A. Well, as far as I am concerned, I don't see any need for any more expansion. That is strictly personal.

Q. Is that personal or on behalf of your company? A. On behalf of my company.

Q. I am still trying to find out from you what you mean and why it is in here. What purpose are you trying to say this for, that is what I am trying to get at? A. Well, as far as my company is concerned, I don't see any need for any expansion as far—

Q. (Interrupting) Expansion of what, that is what I am trying to find out. [405] A. Of any more railroads.

Q. Is anybody proposing any railroad operation on Peninsula Terminal that you know of in addition to the Peninsula Terminal Company? A. Only what I read in the papers.

Q. What do you read in the papers? A. Oh, I couldn't tell you, just everything there is in there, but I understand they all want to get in there.

Q. All railroads want to own it, is that what you understand? A. I don't know whether they want to own it but they want to be able to operate over it.

Q. Is that your understanding? A. That was my understanding.

Q. Who told you that? A. I believe that is what I read in the papers.

Q. That is what you read in the papers? A. I think so, sir.

Q. And that is what you are talking about, you don't think there is any need for any railroads to operate over the Peninsula Terminal Company in addition to the Peninsula Terminal Company, is that what you are trying to say there? A. That is what I am trying to say.

* * *

[406] A. W. KILBORN

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Young) Would you please state your full name and spell your last name? A. A. W. Kilborn, Ki-l-b-o-r-n.

Mr. Weisser: Mr. Examiner, before we get into the Southern Pacific case, there is apparently some misunderstanding as to what Southern Pacific is asking for in their application in the first finance

docket No. 24890, and it has been our interpretation that in their request for common use of terminal facilities of Peninsula Terminal that meant they actually wanted to run power on that track.

Is that a correct interpretation?

[407] Mr. Devers: Perhaps, Mr. Examiner, if I may, Mr. Weisser, we and the record should have an explanation from counsel for Southern Pacific at this time in view of cross examination questions which have been objected to and which will appear again, an explanation of language which appears in Paragraph 4 on Page 3 of their application in Finance Docket 24890. The last sentence of that paragraph, and this has been read before in these proceedings, reads this way: "Southern Pacific desires to participate in promotion of the industrial development of the important areas served by Peninsula Terminal Company and has concluded that this objective can best be accomplished through an order permitting its common use of Peninsula Terminal Company."

Now, consistent with that paragraph, as we understand it, Southern Pacific has prayed for the following relief from the Commission: One, on Page 5, the common use of Peninsula Terminal Company together with bridge trackage rights over Union Pacific between Peninsula Terminal Company and the Southern Pacific, Union Pacific connection at East Portland, Oregon. Now, if that does not mean that Southern Pacific is here seeking the right to operate over the line of Peninsula Terminal Company, then we think the record should be clarified.

Mr. Wilson: Do you wish me to reply, Mr. Examiner?

Exam. Shoup: Yes, sir, Mr. Wilson.

[408] Mr. Wilson: I think perhaps counsel's problem is that he hasn't read the cases under Section 3(5) of the Interstate Commerce Act. I honestly do not believe that this is the place for me to attempt to state the legal basis for Section 3(5) relief. I think that is a matter for brief. However, I have objected and will state on the record that Southern Pacific in its application has not asked for the right to physically operate over the Peninsula Terminal. There is nothing in the application, as I see them, that sets that forth. If there is any misunderstanding about it I think it should be clarified and it is, I think, clear now what is meant by common use of terminal facilities is a legal connotation which I think you will find is well defined in the cases under Section 3(5) of the Inetrstate Commerce Act.

Mr. Tjossem: Mr. Wilson, may I point out you don't say that. You say an order permitting us common use of Peninsula Terminal Company.

Mr. Wilson: On what page is this?

Mr. Tjossem: Paragraph 4 on Page 3. Now, if you have got the common use of a company, it seems to me you can go out there and use that company in common with other companies.

Mr. Wilson: I think I have made my position very clear on the record. I don't think it can be any clearer. As I say, if you want to argue on brief you are entitled to argue whatever you want about Section 3(5). I will be glad to set [409] forth my views in the brief as to what Section 3(5) relief is or is not. I have, I think, made it quite clear.

Mr. Tjossem: Mr. Examiner, I do not believe that this is a matter of brief. I think the parties are entitled to know what the Southern Pacific is seeking.

Mr. Wilson: I have just finished telling you, how can I make it any clearer?

Exam. Shoup: Counsel has indicated orally here what S. P. seeks in this 24890 finance application.

Mr. Tjossem: That does not include the right to use the tracks of Peninsula Terminal.

Mr. Wilson: That is exactly what I said, sir. It seeks direct access to reach the terminal facilities.

Exam. Shoup: Mr. Wilson has indicated that Southern Pacific has not asked for the right to physically operate over the facilities of Peninsula Terminal, is that correct?

Mr. Wilson: That is correct. We have asked that Southern Pacific be granted the common use of those facilities and the right to get up there on the main line trackage pursuant to Section 3(5) of the Interstate Commerce Act.

Mr. Devers: And the common use of those facilities is not limited to Peninsula Terminal ownership in North Portland.

Mr. Wilson: All I can suggest is that you read the Interstate Commerce Act and read the cases. That is all I can suggest.

[410] Mr. Devers: I guess I haven't read all the cases.

Mr. Wilson: I think it is clear.

Mr. Tjossem: I think it is clear enough now.

Exam. Shoup: Mr. Devers mentioned something about the interchange track, what was that point?

Mr. Devers: Well, I asked him but he referred me again to the Act and the cases that have been decided under the Act. I asked him whether his use of the term "Facilities of Peninsula Terminal" in the pleadings we have just had reference to referred only to Peninsula Terminal's ownership interest in the interchange tracks.

Mr. Wilson: Mr. Examiner, I think the record is quite clear here from applicant's exhibits, from the application, that Peninsula Terminal does not own any tracks outright on the interchange. They are owned jointly by Peninsula and other railroads.

Mr. Devers: I said Peninsula Terminal's interest in the interchange.

Mr. Wilson: We are seeking equal ownership. It is quite clear to me that we have two separate applications under Section 3(5) and we have one petition for inclusion under Section 5(2)(d) of the Interstate Commerce Act. Those are the petitions and application that Southern Pacific has filed in this proceeding. I think they are quite clear and speak for themselves.

[411] Exam. Shoup: You are then seeking an interest in the interchange tracks, are you not?

Mr. Wilson: We are seeking a right to have direct access to Peninsula Terminals, sir, and equal ownership in the stock of Peninsula Terminal.

Exam. Shoup: Is that sufficient, counsel?

Mr. Devers: I guess it is going to have to be, Mr. Examiner.

* * *

Q. (By Mr. Young) Mr. Kilborn, will you explain in what capacity you serve Southern Pacific Company? A. I am the division superintendent of the Oregon Division of Southern Pacific which goes down into northern California and over towards, into Flannigan, Nevada, in operating and maintenance.

* * *

[412] Q. (By Mr. Young) Now would you just designate, please, referring to the map and describing it orally,

if you can, how railroad cars move from Brooklyn Yard by way of U. P. to Peninsula Terminal Company? [413] A. A car destined for a point on the Peninsula Terminal Railroad arriving at Brooklyn would be in a group of cars to be interchanged to the Union Pacific Railroad at Albina Yard. These cars would be moved in this group of cars by a Southern Pacific engine via the S. P. track, the blue track, to a point at East Portland which is the designated point of interchange insofar as time is concerned for the receipt of those cars by the Union Pacific.

Q. And on the map that is where the blue track joins with the red track, is that correct? A. That is correct.

Mr. Delisi: I am not sure I heard you. Albina is the designated point of interchange?

Mr. Young: No, East Portland.

A. (Continuing) The same crews and cars would continue their movement, however, on the red track and be brought to rest in Albina Yard where they would be left for the Union Pacific to handle. Then the Union Pacific Railroad would move that car from their Albina Yard to the interchange of the Peninsula Terminal Railroad at North Portland.

Q. (By Mr. Young) Now, that's the way the cars are presently moving from Brooklyn to Peninsular? A. Via the Union Pacific, yes.

Q. If this application of Southern Pacific is granted will the cars continue to move over the same physical track? [414] A. Yes, if this application is granted they would move over the same route.

Q. Now, is there another way cars can move from Brooklyn out to Peninsula? A. Another method in which this can be done is cars arriving at Brooklyn Yard would be in a group or block of cars for the S. P. and S. Railroad. They would be moved via Southern Pacific crew

over the blue line down to where the intersection of the blue and the red line meet and from there they would cross the what is shown on the map as the steel bridge and would be moved into the what we call the depot yard of the Portland Terminal Railroad. They would be brought to rest on one of those tracks by this Southern Pacific crew. Then the Portland Terminal Railroad crew would move these cars to an interchange with the S. P. and S. which would normally be in their Hoyt Street Yard. From there the S. P. and S. would handle them to the interchange of the Peninsula Terminal Railroad at North Portland.

* * *

[415] Q. Now, you stated at the present time S. P. trains and crews presently operate from East Portland to Albina? A. Yes, this is correct. The Southern Pacific crews do this as an agent for the Union Pacific in handling this traffic from East Portland to the Albina Yard.

Q. Has this arrangement been in effect 40, 45 years? A. This arrangement has been in effect, as I recall, since 1922.

Q. And has the arrangement been satisfactory to S. P. and U. P. also, so far as you know? [416] A. Yes, satisfactory.

* * *

Q. Are S. P. employees familiar with the Union Pacific operating rules? A. Yes, they operate under the Union Pacific rules from East Portland to Albina and return now, so they are all well familiar with those rules.

* * *

[419] Q. Mr. Kilborn, as an operating railroad official, in your opinion, could this movement be made over this U. P. segment of track without undue interference to Union Pacific operations? A. Oh, I don't see any problem at

all in that. I have spent some time out around there. I was visiting with a towerman out at North Portland. He told me it took about 15 minutes [420] for a—

Mr. Weisser (interrupting): I will object to this as hearsay.

Exam. Shoup: Sustained.

Q. (By Mr. Young) You will have to testify from your own knowledge and not what the towerman told you. A. Well, I didn't see any trains and I was out there about an hour.

* * *

[423] CROSS EXAMINATION

Q. (By Mr. Weisser) Mr. Kilborn, you indicated that cars are presently interchanged between Southern Pacific and Union Pacific at the Albina Yard in groups. Are these cars presorted by Southern Pacific before they are handled by Union Pacific? A. No.

Q. Then before Union Pacific moves the cars out to North Portland they have to get the cars out of the cut that belong to North Portland, is that correct? A. If they are not on the head end, yes, sir.

* * *

[425] Q. Now, as I understand it, then, you plan under your proposal, if granted, to run one train out and one train back every evening, is that it? A. I didn't say exactly when we would run them. We would run them consistent with the requirements of the service for the Peninsula Terminal shippers.

Q. At the present time I believe Southern Pacific is handling [426] less than 500 cars a year to Peninsula Terminal. I believe this was the testimony of Mr. Lawrence. What type of service would you need to handle those cars, one every other day? A. Oh, no. We would have to furnish daily service.

Q. You would run out there whether you had any traffic or not? A. Well, if there was a car to get we would go over and get it, and if there was one to take over we would take it over.

Q. And this is the level of traffic you could expect at Peninsula Terminal as exists today? A. We are expecting a lot more traffic—

Q. (Interrupting) Wait a minute, as it exists today. A. Yes, but we are expecting a lot of traffic.

Q. And this is the level of traffic you had last year, around 490 cars? A. If this would be introduced as an exhibit, this would be it. I don't have those figures myself.

Q. Some of those cars could be routed over the Portland Terminal S. P. and S. connection, could they not? A. Well, I wouldn't say any car we would handle would ever be routed over any other railroad to get to Southern Pacific if we operated out there.

Q. Well, if the traffic has that route available today, I don't believe it has been testified to in this record, but some of those 490 cars that you handled last year to North [427] Portland, that were handled for you to North Portland, went S. P. and S., did they not? A. There were some that must have gone S. P. and S., yes, sir.

Q. So if Southern Pacific were to offer this service to North Portland as outlined, would they then have to sort Portland, North Portland cars from their cuts of cars? A. Yes, they would arrive from Eugene in blocks of cars destined for Brooklyn Yard and at Brooklyn Yard we would quickly switch them out and then run this train over to make the proper connection with the North Portland Railroad, Terminal Railroad.

Q. So basically the same functions that the Union Pacific is performing now would be performed in Eugene? A. No.

Q. I mean as far as sorting the cars, is that right? A. No, it would be done in Brooklyn.

Q. Well, then, the cars coming from Eugene would be as mixed up when they get to Brooklyn as when you now take them up to Albina, would they not? A. I don't know for sure, they may not be.

Q. I see, O. K. Do you expect any labor complications if your proposal is granted? A. No.

Q. On the return move from North Portland to Brooklyn would the cars be sorted for Brooklyn to their destinations or [428] would they go further down your line? A. Are you saying when they return?

Q. Yes, on an outbound move from North Portland. A. Generally cars arriving at Brooklyn going south from Brooklyn, unless they are destined for some point north of Albina, Oregon, we take them all to Eugene in a mill run train and then we put them over our computerized classification yard there and switch them into the trains that are going to the various destinations, Texas or Arizona, Los Angeles, San Francisco, so we put them together in blocks and run them in solid trains to Eugene.

Mr. Weisser: I believe that's all the cross examination.

CROSS EXAMINATION

Q. (By Mr. Tjossem) Mr. Kilborn, I gather from your testimony that all of the Southern Pacific trains terminating or originating in the Portland area are made up and broken up at Eugene, is that right? A. Generally cars terminating in the Portland metropolitan area are put over our classification yard at Eugene and made into solid blocks of cars. As I said, for example, solid block of cars for the S. P. and S., solid block of cars for the Union Pacific or for Brooklyn proper or for Pasco, Washington, Chehalis, Washington, or Seattle via the N. P., we make these blocks and when these trains appear—

[429] Q. (Interrupting) The answer to my question is yes, isn't it? A. Yes.

Q. That's what I thought. How far is it from Eugene to Brooklyn? A. About 125 miles.

* * *

[436] Q. (By Mr. Watson) My name is Homer Watson and I represent the Brotherhood of Locomotive Engineers on every railroad in the State of Oregon, that is, first-class railroads.

Mr. Kilborn, I would like to go back to Mr. Baker's testimony yesterday in which I am sure you were here and heard him testify that the operations of the Union Pacific Railroad from the north end of Albina Yard to North Portland or the Peninsula Terminal interchange point and the movements in there were at times heavy and they had experienced considerable congestion. Now, you just testified in the last few minutes to the Union Pacific counsel that you felt your movements from the north end of Albina Yard through North Portland junction or the Peninsula Terminal interchange tracks would not further congest this area. How do you arrive at this? A. I don't think I testified that it would not further congest [437] the area. I respect Mr. Baker's opinion on traffic congestion and what I said, as I recall, was that our movements could be made over this same piece of track because I didn't think it was that congested.

* * *

[438] Q. (By Mr. Watson) Mr. Kilborn, you also testified and it wasn't clear to me as to the place where you indicated in a tower that you were observing the amount of traffic flow over this piece of bridge trackage that you are interested in. Could you for the record indicate where this tower is [439] located? A. Yes, it is at North Portland right at the junction of the Peninsula Terminal Railroad was the tower I was speaking of.

Q. Well, this wasn't clear in my mind as to whether it was at that end of the area in which we are discussing or it was at the south end near the steel bridge tower. In your observations from this tower there seemed to be very little congestion or was there quite a few trains moving in this area? A. Well, I only spent about an hour out there one day to look at the interchange and there were no trains at that time that happened to use the interchange. This may have been unusual.

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[445] F. WASCOE

was sworn and testified as follows:

• • •

DIRECT EXAMINATION

Q. (By Mr. Wilson) Will you state your full name and business address for the record? A. My name is F. Wascoe. My business address is 65 Market Street, San Francisco, California, 94105.

Q. By whom are you employed, Mr. Wascoe? A. By the Southern Pacific Company.

Q. What is your position with Southern Pacific? A. I am manager of the bureau of transportation research.

• • •

[498] Q. Then I will ask you, did you take into account in setting up your future operation that there might be a change in this furnishing of empty cars if you got direct access to Peninsula Terminal? A. No, I didn't. I had no way of predicting what might occur.

Q. Don't you believe that that direct access might cause you to [499] furnish empty cars where you are not furnishing them today? A. I don't see why not. I think we are supplying cars as requested to the extent and ability we have to supply them. I don't really see any reason why direct access would change the situation as far as empty car supply is concerned.

• • •

[514] O. G. LINDE
was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Wilson) Would you please state your name and business address for the record, Mr. Linde. A. My name is O. G. Linde, 65 Market Street, San Francisco.

Q. By whom are you employed, sir? A. Southern Pacific Company.

Q. What is your position with Southern Pacific Company? A. Manager of industrial development.

* * *

Q. Now, if the Southern Pacific has the right to connect directly with the Peninsula Terminal Railroad, would the Southern [515] Pacific under those circumstances attempt to locate industry in the Rivergate area? A. Yes, it would.

Q. Would you state why that would be so? A. The Rivergate Industrial area is unique in many ways. First, here we have an area in the close proximity of a metropolitan area which contains several thousand acres of industrial property uniquely located on deep water and in addition it is publically owned. We feel that the success of such a large industrial development will largely depend upon the flexibility which is given as far as rail service is concerned. I think we must recognize here that some of the major markets served, to be served by the industrial production and industrial growth of the Rivergate area will be in California and the Southwest areas which are served by the Southern Pacific lines. Therefore, we feel that the success of the area, the Rivergate area will be largely dependent upon S. P. service being given.

Q. Now, if the Southern Pacific does not have direct access to the Peninsula Terminal would that same incentive

be present for the locating of industries in the Rivergate area by Southern Pacific? A. No, it would not.

Q. Would you explain why not? A. Well, the basic one is that by having direct service to [516] the Rivergate area we know what kind of service we can give to the industries, we can assure them of a specific service and the service they need by not having that access obviously we can not assure them of that service and we would not feel as strongly about locating industries there.

Mr. Wilson: You may cross examine.

CROSS EXAMINATION

* * *

Q. Were you present when Mr. Sandell testified a day or two ago? A. I was not.

Q. He indicated that you were instrumental in locating the Collier Carbon and Chemical plant in the Rivergate area, is this true?

* * *

A. We have worked with several industries who are presently located in that area.

Q. What do you mean worked with? A. Well, we have industries, most industries we deal with often [517] come directly to us in seeking plantsites. Based upon the criteria which they outline to us we try to find them a site. Obviously when they describe the Portland area the Rivergate Industrial has been one of the sites which—

Q. (Interrupting) Which you take people out and show? A. No, we have not.

* * *

Q. And you did inform Mr. Sandell of the Carbon Chemical plant [518] of the site at Rivergate? A. There is no industry I know of who would have to be informed about the presence of the Rivergate Industrial. All of those with whom we have dealt in the Portland area are already aware of it, and it always becomes a matter of discussion.

* * *

CROSS EXAMINATION

Q. (By Mr. Tjossen) Mr. Linde, you say you have never taken industry out there, have you been out there yourself and looked over the Rivergate area? A. Yes, sir.

Q. Have you any idea as to when that development is going to be completed?

• • •

A. By completed I presume you mean when it is filled with industries?

Q. Yes. A. I would say we are looking towards at least twenty years plus.

Q. What is the present condition of most of that area out there, does it need filling? A. A lot of it does need filling, yes indeed.

Q. And there would be filling to a considerable depth wouldn't [519] there? It would be pretty heavy filling? A. In certain parts.

• • •

E. C. ORDWAY

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Young) Would you please state your full name and spell your last name, Mr. Ordway. A. E. C. Ordway, O-r-d-w-a-y.

Q. By whom are you employed? A. Southern Pacific Company.

Q. In what capacity do you serve Southern Pacific Company? A. Traffic manager in the northern territory.

Q. What is the northern territory? A. That includes the area north of the California line including states of Oregon, Washington, western half of Idaho, and Montana, all of western Canada, and Alaska.

• • •

[527] CROSS EXAMINATION

Q. (By Mr. Weisser) Let's talk about the switching charges on the Monarch Shingle move to Crestwell, Oregon. A. Yes.

Q. Was this the Peninsula Terminal switch charge that was passed onto Monarch, is that your testimony? A. It is a charge that covers the switching service from the industry to connection with the Southern Pacific Company at East Portland.

Q. Is it the Peninsula Terminal switch charge? [528] A. It is a charge that is established, it is carried in the Union Pacific tariff and is named—I am not a tariff expert, I haven't got the tariff here, and I couldn't give you a clear explanation on it.

Q. I assume you have the details on the charge? A. I have the amount, yes.

Q. What is the amount? A. If I can get my notes here to refer to. It was $32.29.

Q. And that covered what service? A. Service from the time we delivered it to the Union Pacific until it was spotted on the industry.

Q. To industry? A. Or from the industry, it was from the industry to the S. P.

Q. Which way did the move go? A. The movement was outbound. The Industry loaded a carload of shingles to a destination on our line. It was outbound. This covered the service from the time it was pulled from that industry until it reached Southern Pacific.

Q. So it would include the Peninsula Terminal switch charge? A. I believe it would.

Q. That is your testimony, isn't it? A. That is right.

Q. And the Southern Pacific did not absorb that switch charge because it was a noncompetitive point, is that your testimony? A. We may not have any way even if it had

been competitive, [529] we may not have, depending on whether our revenue was sufficient to permit the absorption of it.

Q. Well, I think in your testimony just previously to mentioning this Monarch Shingle move you said there are noncompetitive moves on which there is a switch charge, but you would establish an absorption of the switch charge if you had direct access to Peninsula, is that correct? A. I said we would apply our rates there.

Q. The effect of that is absorption of all switch charges, is it not? A. We had in mind one-line movement out there. Southern Pacific actually getting out there and connecting with the industry, then our rates would apply. We would be part owner of the Peninsula Terminal Company and our rates would apply.

Q. So you are unwilling to do that under the present circumstances, is that correct? A. Well, I would have to make a study of that. I am not prepared to say that.

Q. You are not prepared to say you would not absorb these switch charges? A. I would have to take a look at the cost factors.

Q. Isn't it true, Mr. Ordway, any time a move develops of any substance at all you are willing to absorb all switch charges to Peninsula Terminal? A. Any kind of a movement?

[530] Q. Well, when there is any substance to it at all and someone comes in and says, "Mr. Ordway, I am going to expect to be moving between these points for the next few years, I want to have some rates set up so these movements can take place," you do in those cases make concession and absorb the switch charge, do you not? A. It depends on the circumstances. We have in some cases done this. Other cases where the revenue does not justify it we don't.

Q. There may be an isolated move here and there where a switch charge may be assessed, but this is not the general practice on your railroad in serving Peninsula Terminal, is it? A. Based upon the—in Oregon from noncompetitive points in Oregon where the rates are relatively low in revenue, it is our practice not to absorb the switching charges from noncompetitive points outside of the state of Oregon we have a provision absorbing the switching charges in all cases.

Q. Is there a breaking point in the revenue factor? A. No, it is a geographical factor at the present time, but this was based primarily upon the fact that the distance, we had to have a breaking point some place. We broke it at the Oregon line.

* * *

[533] Q. Now, you have indicated you received complaints on delays in handling cars between, I believe you said Albina and North Portland, and S. P. & S. and North Portland. How many complaints did you receive in 1967? A. We never counted them. We never kept a record of the number.

Q. One? A. Oh, no, it is more than one because there is more than one shipper involved. Our problem has been the difficulty getting [534] business for our railroad out there because of the complaints.

Q. Let me ask you this, did you contact anybody in Union Pacific to bring this to their attention? A. Over the years—

Q. (Interrupting) Well, did you when you received this one or more complaint last year? A. No, not at that immediate time.

Q. I see. Why didn't you do that? A. We have—matters of service, delays with the Union Pacific have been handled by our operating people, Mr. Kilborn—

Q. (Interrupting) So you wouldn't get into that, would you? A. No, that is something I turn over to the operating superintendent.

Q. And you don't know whether he handled it with Mr. Baker? A. He has told me he handled it with Union Pacific, I don't know if it was with Mr. Baker or not.

Q. Do you receive any complaints on your service in this area? A. We are like any other railroad, we occasionally have some, but we endeavor, and in many cases correct those service failures improving the time.

Q. And this is common with all railroads that occasionally there are service failures they are always endeavoring to correct service, is that not correct? A. That is correct.

Q. Now, Exhibit 45, and the numbers showing cars tendered to [535] either S. P. & S. or Union Pacific, is it your testimony that whenever a car is brought into Brooklyn Yard that it will immediately be taken out to Peninsula Terminal? A. You mean in connection with our plan to run through service out there?

Q. Yes, if you have running rights out there. A. Mr. Kilborn discussed that matter. He said he would establish the service that was—to run out there that was needed in order to provide service desired by the shippers.

Q. Could you answer the question, please.

Mr. Weisser: Could you read the question, please.

(Question read.)

A. No, that is not my testimony, not immediately.

Q. (By Mr. Weisser) In other words, cars will be accumulated and taken out the same way Union Pacific accumulates cars? A. Not that same way. We would have a scheduled time for going out there.

Q. I see. A. The cars that have been accummulated since the last move out there would move out at that time.

Q. In other words, cars would either have to be sorted at Brooklyn or some other point on Southern Pacific and put into blocks before they could be taken out to Peninsula Terminal if u were granted through service? A. When we went out there we would have cars just for the Pen-[536] insula Terminal Railroad or whatever it served. These cars would either, this again is in Mr. Kilborn's jurisdiction not mine, and I am not just clear how he would handle that.

Q. Your company now furnishes empty equipment to Peninsula Terminal industries? A. In most cases we do.

Q. In fact, you give specialized equipment out there to shippers, do you not? A. Yes.

Q. Upon requests such as Crown Zellerbach's pole yard and D. F. Carr requirements for the Flex-Pac? A. That's correct.

* * *

[537] Q. This is what I am getting at, when trains arrive at Brooklyn they are not immediately spotted to the industry, they are accummulated for your train schedules that go out to these various industries, are they not? A. Yes, they are.

Q. This is much in the same way Union Pacific operates out of Peninsula Terminal, is it not? A. The time difference is considerable.

Q. But the operation is the same? A. It could be, I am not familiar with their operation.

* * *

[538] CROSS EXAMINATION

Q. (By Mr. Tjossen) Mr. Ordway, just to make it clear on the record, do you mean to indicate the situation out here at Peninsula Terminal is unique to the assessment of switch charges to those industries? A. No, I don't think it is unique at all.

Q. You have quite a large area here in Portland that is served exclusively by the Southern Pacific, don't you, industries that are serviced exclusively by your company? A. Yes.

Q. With respect to those industries do you not require them to pay or do they not have to pay a noncompetitive switch charge where you are handling traffic, switching traffic for another line going to a noncompetitive point? A. I am not clear on your question there, give me an example.

Q. Well, let's take an exclusive Southern Pacific industry served by your company alone. A. In Oregon?

Q. In the Portland Terminal District. A. The Portland Terminal District?

Q. Well, in the Portland area we will say. A. You mean outside, this could be outside the switching limits?

Q. Or within the switching limits. [539] A. An industry within the switching limits within Portland.

Q. Exclusively and we will say it is going to a Great Northern noncompetitive point. Wouldn't you require that industry to pay a noncompetitive switch charge? A. This is up to the Great Northern Railway whether they want to absorb that or not. This is their privilege.

Q. I see, but if the Great Northern elects not to absorb the industry would have to pay? A. Yes.

Q. And it is the general practice of all carriers in this terminal to not absorb the switch charge on noncompetitive traffic? A. Yes.

Q. And your company does the same thing? A. That's correct.

Q. Are you familiar with Mr. Wascoe's Exhibits 42, and 43, and 44? A. No, I haven't even seen them.

Mr. Tjossen: I wonder if counsel would furnish you with a copy.

Q. (By Mr. Tjossen) As I understand it, if Southern Pacific has direct access to Peninsula Terminal you propose to extend your Portland rates to that area. A. That is right.

Q. As I would understand his Exhibit 42 he shows from the [540] sample that he collected that on the average, the weighted average, your company if it was going to absorb the present switching charges would have to absorb $44.27 per car, is that the way you understand his Exhibit 42?

Mr. Young: I object to this. I don't think it matters how Mr. Ordway understands Mr. Wascoe's exhibit, I just don't think that is a proper question, Mr. Tjossen.

Mr. Tjossen: I am laying a foundation, Mr. Examiner.

Exam. Shoup: Overruled.

A. Let's have that question again.

Q. (By Mr. Tjossen) I just asked you if you understood Mr. Wascoe's Exhibit 42 that if you were going to absorb the present switching charges that the weighted average of those charges would be $44.27 per car? A. That is not the present switching charge.

Q. What is the present switching—this is a weighted average. A. Well, you mean $44.22 is not the switching charge, and as far as I know there is no intention of publishing that amount as a switching charge.

Q. As I understand Mr. Wascoe's testimony this was the average charge your company would have paid on the

sample cars that moved. A. Well, not to my understanding. This is a cost, estimated variable cost to handle traffic between S. P. and Peninsula Terminal Company. Now whether this is on the basis of what [541] it would cost us to operate ourselves out there or not I don't know. I am just not that familiar with it.

Q. What are the tariff charges? A. I named them.

Q. Is that $32.29 a car generally? A. I believe it is $32.29, yes.

Q. Now, that is the charge that you today will not absorb unless there are special circumstances. A. Yes.

Q. Now, I refer you to Mr. Wascoe's Exhibit 43, you heard his testimony this morning, didn't you? A. Yes, I did.

Q. If you are going to move five cars yourself upon obtaining direct access, as I understood his testimony that would cost you $37.12 per car in each direction or a total cost of $74.24 per car in and out, isn't that the way he estimated the cost?

Mr. Young: Well, again, Mr. Examiner, I think this is improper cross-examination of this witness on another witness's exhibit. I don't think it is proper, these questions should have been asked of Mr. Wascoe.

Mr. Tjossen: I am laying a foundation for this witness.

Exam. Shoup: Sustained, the objection is sustained.

Q. (By Mr. Tjossen) I will ask you then, Mr. Ordway, if you will absorb a switch charge of $32.29 only if there

are spe- [542] cial circumstances, how is it that you will extend your Portland rates out to Peninsula Terminal when your cost man estimates the cost of performing that service in and out, if it moves in five car lots to be $74.24 a car? A. Well, I am just not able to say that. I am not qualified or in a position to say that at all.

Q. But you say you will extend your present line haul rates out there. A. This is a matter that has been established, I mean our people, our company has decided to do this, yes.

Q. And that is without regard to the costs involved or without regard to whether the rate would be compensatory in view of the service? A. I am sure that has been considered, but I was not in on that.

Mr. Young: I would point out to counsel, Mr. Examiner, that Exhibit 43 shows the cost, estimated variable cost to Southern Pacific Company to handle traffic to and from the Peninsula Terminal Company at $37.12, not the 74 he is indicating.

Mr. Tjossen: As I understood it, he said that was the cost in one direction.

Mr. Young: Well, read the titles of the exhibit, Mr. Tjossen.

Mr. Tjossen: I can read the titles but I was going back [543] to what I understood he said.

Q. (By Mr. Tjossen) Then, I will state the question this other way. As I understand it, you are testifying that your company would absorb the switching charge of $32.29 only if there were special circumstances involved and yet you will extend your Portland rates out here even though the additional service of getting there is going to cost you, as shown by your own cost man, $37.12 a car, is that correct? A. We have decided to apply our Portland rates out there.

Q. And that is without regard to whether these short-line rates would be compensatory or not compensatory? A. Undoubtedly that was taken into consideration, I am not in a position to say.

Q. Did you take that into consideration? A. I didn't make that decision.

Q. Who made that decision for your company? A. It was made by our vice-president of traffic.

Q. Did he ask you for recommendations? A. No; no.

* * *

[544] CROSS EXAMINATION

Q. (By Mr. Weisser) Mr. Ordway, on Exhibit 45 could you tell me where you got these figures? A. We got a great deal of it from Mr. Wascoe. He supplied it and where he got it I am not sure.

Q. I mean the times and the dates were from Mr. Wascoe? A. The times and dates were secured as I understand through the Portland Terminal Company records, through the Peninsula Terminal Company records, and through our own records.

Q. And when you made this sample did you look into the movements to see what happened on any of these moves? [545] A. Not beyond our line.

Q. So you are just looking at the originating time and terminating time, and you make a mathematical computation as to the elapse, and there is no determination of what went on in between, is that your testimony? A. That's correct.

* * *

[551] LARRY H. DUGAN
was sworn and testified as follows:.

* * *

[553] DIRECT EXAMINATION

Q. (By Mr. Ploeger) Mr. Dugan, would you state your full name and address? A. Larry H. Dugan, 611 White Building, Seattle, Washington, 98101.

Q. Mr. Dugan, have you prepared your testimony in this proceeding, which has now been marked for identification as Exhibit No. 47? A. I have.

Q. Is that a true statement? A. It is.

Q. And are the exhibits identified as Exhibits 48, 49, 50, and 51 referred to in your testimony? A. Yes.

Q. And explained there? A. That's right.

Q. By way of supplement to your testimony, Mr. Dugan, I would like to ask, is it the purpose of the Milwaukee in petitioning in this proceeding to provide upon its extension to Portland, if and when that should occur, that all industries on Peninsula Terminal or any extension thereof would be on line industries for the Milwaukee? A. That is right.

[554] Q. And in that instance it would not be necessary for you to have a switching tariff or any absorption of tariffs? A. That is my understanding.

* * *

CROSS EXAMINATION

Q. (By Mr. Weisser) On your Exhibit 47, Mr. Dugan, Page 7, you refer to your Exhibit 51 pointing out that you have been authorized to file formal application under Section 1 (18) and 5 (2) covering line extensions and trackage rights covered by the Milwaukee conditions of the Northern lines merger case. Then you make the statement, "* * *

including operating rights any and all terminal facilities in the Portland Terminal area." Do you see that? A. You say I say—I see it, yes.

* * *

Q. "*** * including operating rights upon all terminal facilities in the Portland area." Does that mean we are to expect an application which would seek access into Albina Yard and [555] Guilds Lake Yard and Barnes Yard of all the carriers presently serving Portland? A. I am not prepared to say here just to what extent that will be. I do say in my testimony that at appropriate times before or after the Commissioner has fired an effective date for its order we will take appropriate action. It is my understanding that Exhibit 51 covers the application specifically as to the Peninsula Railroad and—

Q. (Interrupting) No. 51? I thought Exhibit No. 48 made reference to this instant application? A. Yes, I think that is right, and then in 51 we have board approval to go ahead with other actions to implement the Commission's decision.

Q. Including the right to acquire operating rights over and to operate upon any and all terminal facilities in Portland, Oregon. That is on the second page of 51, is it not? A. I will let the exhibit speak for itself on that.

Q. Well, then, is it your testimony that you plan on filing an application that would allow you into Albina, Brooklyn, Guilds Lake, and Barnes, in any of these yards? A. I told you I am not in a position to say what will be the extent of the appropriate actions we will take later.

* * *

[556] Q. (By Mr. Weisser) You would agree with me, then, based on your testimony that a Section 1(18) or 5(2) application is necessary but Milwaukee is not now a railroad in the territory serving Portland, would you not? A. We are not physically serving Portland now.

Q. And you are not in the territory, are you?

* * * * *

[557] A. We are certainly a railroad in the territory in that we handle business that originates and terminates in Portland. We are not physically as an operating railroad in Portland.

* * *

Q. You say upon implementation of its conditions. Do you foresee anything that would be required to implement that condition other than the Commission deciding to set a date for the Northern lines' merger to be consummated? A. Certainly when the Commission's order in the Northern lines case is effective, we will be operating through train service between Sumas, Washington, as a connection for British Columbia and Portland.

Q. What do you mean by "through train service"? A. Just that. I couldn't say it any plainer. We will originate trains here and we will terminate trains here.

[558] Q. In Portland? A. In Portland.

Q. There has been some cross-examination by your counsel concerning the possibility of having a contract arrangement for handling Milwaukee traffic into Portland via one of the Northern lines. Were you here— A. (Interrupting) Not on line haul service. That isn't what we contemplate.

Q. What do you contemplate, that through train service would apply to Peninsula Terminal? A. We would expect to have Peninsula Terminal Company open to us. That is why we are asking joint ownership with the other three lines, or other two lines and then the third line, and we are asking for trackage connections from North Portland to the connection with the Peninsula Terminal line so we can give that through service.

Q. Will a through service to Peninsula Terminal that you contemplate have Milwaukee power operating into the North Portland interchange yard? A. Yes, sir.

Q. Even with— A. (Interrupting) To the North Portland area.

Q. North Portland area? A. Yes. Now, I believe from the testimony I have heard here, we do have an operating man on that, that the north terminal [559] yard would make a very practical arrangement for all the carriers serving Portland.

Q. For their interchange with Peninsula Terminal Company, is that your testimony? A. It could be that way.

Q. There is some confusion in my mind about whether you intend to use North Portland Yard as a point of interchange for all other areas in Portland? A. We would like to have that.

Q. That is not in your application, however, in this proceeding, is it? A. I would have to refer that question to counsel.

Q. Notwithstanding the fact that Milwaukee's present participation in traffic at Peninsula appears to be minimal, you would run your own trains into the North Portland Yard for interchange, is that your testimony? A. I think the record does show here that the business of the Peninsula Terminal Railroad and the industries on it is not large. But naturally we would expect to, that is why we would like the joint ownership, so as the terminal line is extended we would expect to get into the Rivergate area and be a potent part of the Rivergate area.

Q. What if this development of Rivergate is in the future, I think Mr. Linde said it was twenty years plus that he anticipated the full development of Rivergate, is it still your [560] testimony that you would want to run your power into the North Portland interchange? A. That

is right. We have been in business for 120 years and I expect we will be a good many hundred years hereafter.

Q. For the handling of about 46 cars a year? A. That will develop.

Q. You make the statement on Page 10 toward the top, "There is no point in setting up fast competitive schedules, however, where terminal delays caused by going through one or more competing connecting lines to get to the industry can more than offset any advances in service." Now, is this strictly addressed to Peninsula Terminal Company or is it addressed to the whole Portland territory? A. It would be the whole Portland territory and is true in transportation generally.

Q. Then you are desirous of getting into all terminals of all railroads in the Portland area? A. I didn't say that, and, as I said, we will have to consider what terminals we would like to have through cooperation and dealing with the other carriers, if possible. We definitely expect to give a full transportation service in Portland.

Q. Through connections with other lines, then? A. If that can be worked out, fine.

Q. And you would be satisfied, then, to interchange your traffic so that Union Pacific, for instance, could handle it [561] to their industries? A. We would have to see how it works out. Our position is that we want to be in Portland on a full equal competitive share basis with the other trunk lines or transcontinental lines serving Portland.

Q. However, you don't know what your applications will contain under Section 1 (18) or 5 (2)? A. I would not want to try to delineate that now.

* * *

[562] Exam. Shoup: Before excusing this witness the Examiner would like to ask the witness—

It is the understanding of the Examiner that the specific trackage rights which Milwaukee will request are not known at this time, is that correct, sir?

The Witness: Beyond this North Portland. We are speaking—we are asking very definitely joint ownership in the Peninsula Terminal Railroad and trackage rights over the connection from the S. P. and S. main line. We will be operating over to the connection with the Peninsula Terminal Railroad.

Exam. Shoup: Then, to that extent it is specific?

The Witness: It is specific.

Exam. Shoup: But not otherwise?

Mr. Ploeger: Mr. Examiner, if you will look on Exhibit 6 of the application of the Union Pacific and S. P. and S.—

Exam. Shoup: I don't have a copy of the application, sir. The Commission didn't see fit to provide me with a copy before this hearing.

Mr. Ploeger: Here is another exhibit I forgot to number. It is in the record, too. This shows the North Portland interchange track in red, or purple and yellow.

Exam. Shoup: The Examiner is familiar with that.

Mr. Ploeger: This is what the Milwaukee is seeking trackage rights on plus perhaps trackage rights on the Peninsula Terminal to the extent it is needed for tail track, and our [563] other operating witness will explain this.

Mr. Weisser: This is not in the application, Mr. Examiner, as we read it.

Mr. Ploeger: Well, regardless, we will explain that with an operating witness. As I explained to you, the trackage rights that we are asking for are specific and known.

* * *

[564] JAMES T. HAYES
was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Ploeger) Mr. Hayes, will you please state your full name and address? A. My name is James T. Hayes, 538 Union Station, Chicago, Illinois.

* * *

Q. (By Mr. Ploeger) Mr. Hayes, do you have before you what has been identified as Exhibit No. 53? A. Yes, sir.

Q. Is that your testimony in this proceeding? A. It is.

Q. And the maps and other attachments thereto are part of your testimony? A. Yes, sir.

Q. Is everything in there true and correct? [565] A. Yes.

Q. Is there anything you need to add to it? A. No, sir.

* * *

CROSS EXAMINATION

* * *

[566] Q. Let me ask you this. It is true, is it not, that upon Milwaukee's access to Portland, should this be granted, the Milwaukee will be absorbing switch charges in the same manner as all other carriers serving Portland as outlined by Mr. McIntosh's testimony in our direct case? A. I assume we would be doing the same as other railroads, yes.

Q. This is one of the recognized methods of the carrier not directly serving a particular point becoming competitive on the traffic, is it not, or would that be a better question for Mr. Cullen? A. I think this would be a better question for him.

* * *

[569] Q. This statement in the middle of Page 4, the last sentence in that first paragraph, "It still would be our intention to work out an efficient means of interchanging this traffic via North Portland," this, to me, is not too clear in light of your previous sentence where you talk about physical train moves. Is this what you anticipate as physical train moves into North Portland or do you want to work out some other arrangement for the handling of your traffic? A. Well, as my testimony states, we would attempt to set out the North Portland business at North Portland if the operating line would permit us to do this. If, however, they do not feel this can be done or would not permit us to do it, then we would negotiate with them a means of their handling it for us as our agent.

Q. If I understand your testimony, then, you are intending to either run your own trains or contract with the Northern lines for the handling of North Portland traffic, whichever would be the more efficient? A. We intend to operate our own trains into Portland. As a part of this operation, we would set out at North Portland, if permitted to do so. If, however, the owners of the line would not permit us to stop and set out there, then we would attempt to work out an arrangement with them whereby they would handle our cars into the interchange at North Portland if we had the trackage rights there.

[570] Q. Whether the Milwaukee serves Portland or North Portland directly by switching its own trains into the interchange or whether it contracts with the S. P. and S. or whoever you might call the owning lines for the handling of this traffic, the Milwaukee car supply would be available for Peninsula Terminal, would it not? A. Yes, it would.

* * *

PHILLIP J. CULLEN

was sworn and testified as follows:

[571] DIRECT EXAMINATION

Q. (By Mr. Ploeger) Will you please state your name and address? A. My name is Phillip J. Cullen. My address is Room 784, Union Station Building, Chicago, Illinois.

* * *

Q. (By Mr. Ploeger) Mr. Cullen, do you have before you what has been marked for identification as Exhibit No. 54? A. Yes, sir.

Q. Is that your testimony in this case? A. It is, sir.

Q. Is it true and correct? A. It is.

Q. Are there any additions or changes you wish to make? A. No, sir.

* * *

CROSS EXAMINATION

Q. (By Mr. Weisser) On Page 3 you mention the schedule you have between Chicago and Seattle. What schedule would you expect to have between Portland and Chicago?

* * *

[572] Q. Perhaps I didn't ask the proper witness the proper question on the switch study. Are you more familiar with this, perhaps, than Mr. Hayes? A. What is the question, sir?

Q. The switch study here in Portland. A. I know of it just in a general way.

Q. And you concur in Mr. Hayes's testimony that should Milwaukee be admitted to Portland it would absorb on the same basis as the lines presently in Portland?

Mr. Ploeger: Mr. Examiner, I would like to point out to counsel that the conditions of the Commission

in the Northern lines merger case are a part of the record. They spell out what we will do as between ourself and the Northern lines in the way of absorption in switching. Also the agreement between us and the Northern lines for our actual operation to the extent that it has been—there is any agreement at all with the Northern lines is also in the record, it is a part [573] of the testimony of the applicants. This, I think, gives you ample opportunity to know exactly what we are going to do in Portland.

With that in mind, you may proceed to cross-examine. But I don't believe it is necessary for us to go extensively into cross examination on what is in the record.

Exam. Shoup: Mr. Ploeger, that Northern lines merger proceeding is not actually part of the record in this proceeding.

Mr. Ploeger: Mr. Examiner, a part of the conditions that were awarded to the Milwaukee are. Of course the Commission can take judicial notice of what they have said and done.

Exam. Shoup: That is true.

Mr. Ploeger: But the conditions that were set forth in the Commissioner's order are now a part of the record. They were identified as Exhibit No. 50.

Exam Shoup: I beg your pardon, sir?

Mr. Ploeger: The agreement is also in the record as a part of Mr. Hayes's testimony and also as a part of the testimony put in by one of the witnesses for the applicants, Mr. Lawrence.

Q. (By Mr. Weisser) Let me ask you this, then, Mr. Cullen. Would your Milwaukee participation in the Portland switch study or the common point switch study in the

Pacific Northwest be covered by any of the Milwaukee conditions in the [574] Northern Lines case? A. I don't understand your question. If we get into Portland, then our other agreement with the Northern lines regarding the switching of cars in Portland will be a fact.

Q. That is just between yourself and the Northern lines and does not apply to the Union Pacific or Southern Pacific, isn't that right? A. That is right. It is between the Milwaukee and the Northern lines, yes, sir. Of course this agreement will probably have an effect on other switching arrangements in Portland unless the study that has been referred to here is already a fact and the elimination of the competitive and non-competitive switching system is a thing of the past.

Q. That is what I am trying to get at. If it is a thing of the past or if it becomes a thing of the past once Milwaukee enters Portland, will Milwaukee be part of that, will they absorb switch charges on the same basis as other roads serving Portland? A. We want to be competitive in Portland. We want to do everything possible to be on a competitive basis with the other trunk lines in Portland.

Q. Is this on competitive traffic only or on non-competitive traffic also? A. If we are into Portland as a trunk line carrier, then we will have our arrangement with the S. P. and S., which doesn't, [575] which contemplates the elimination of the dual system of switching rates in Portland. You will have, if the other action precedes it and you have a new switching deal, then you will have a switching rate that can be absorbed by the line haul carriers. We will be absorbing whatever charges are necessary to keep us competitive with the other carriers.

Q. Competitive with other carriers? A. Trunk line carriers, yes, sir.

Q. Your statement starting at the bottom of Page 4, the top of Page 5, you say, "It is well recognized in the railroad industry, and my experience bears this out, that a shipper, all other things being equal, will generally favor the switching carrier with his competitive business." Will the switch charge be one of these factors which will make it equal—strike that. May I retract that question, please.

Will the switch charge absorption by Milwaukee have the effect of giving it equalty with the switching carrier? A. Well, of course, the absorption provisions also would enter into it. If we are not in a position to properly absorb and a charge has to be passed on to the shipper, then we won't be competitive.

Q. But you will absorb on all competitive traffic, you said? A. To whatever limits we are allowed to absorb or that we conclude we should absorb. There are certain limitations that all the carriers have and which are, it is general policy [576] for a carrier to limit his absorptions.

Q. I see. So whether or not you are made equal with the switching carrier would be up to your absorption policies, is that correct? A. It would be up to whether or not the charges involved would be such that we could absorb, and that is why in this case we are seeking an opportunity to participate in the Peninsula Terminal. We want to make sure we aren't going to be shut out.

Q. Is there some set limit in the policy of your company which sets your absorption level or absorption limits? A. Well, it all depends on how much is involved, how much revenue is involved, what the costs are. If the costs are too high we are priced out of the market. That is why we are asking to become an owner of the Peninsula Terminal, to assure that that doesn't occur as far as Peninsula Terminal traffic is concerned. I point that out in my testimony here.

Q. Would ownership of Peninsula Terminal alone determine whether or not your absorb their charges? A. Oh, no. I didn't say that. I said as far as the Peninsula Terminal goes we want to acquire ownership so we could prevent being shut out on their business.

Q. That is the reason, then? A. Well, this is one of them.

Q. If I understood your answer to the previous question, you [577] said ownership of Peninsula in and of itself would have no bearing on whether or not you absorbed a particular switch charge? A. I don't follow the question. Now I lost you.

Q. I understood your previous answer to be the reason you want to own a piece of Peninsula Terminal and have direct access to that carrier is to become competitive. I contend or put to you that you could be competitive by absorbing the switch charge, but you tell me for some reason you can't absorb the switch charge unless you own the company. Now, I don't understand that. A. I think it is quite simple. If we are not an owner of the company, the owners could set the switch charge so high that we couldn't afford to absorb it. We want to get in on the Peninsula Terminal to participate in their business today and for the future and we don't want to be shut out of this.

Q. Do you envision that that would be the case, that Union Pacific and S. P. and S. would set the switch charge so high that we would shut you out of the business, as you put it? A. Either the switch charge or the service performed could shut us out. It is a combination of a good many things.

Q. You are familiar, are you not, with the application in this proceeding of Union Pacific and S. P. and S. and the representations we made to keep open the channels of

trade as [578] they exist? A. Yes, sir. As they exist, yes, sir.

Q. And if Milwaukee comes into Portland as a carrier and other carriers are getting the same set switch charge, couldn't the Milwaukee, if, in fact—strike that.

Wouldn't the owners of Peninsula Terminal be discriminating against Milwaukee if they set a different switch charge and be subject to action from the Interstate Commerce Commission upon complaint to set the same switch level? A. The owners are only going to be dealing with themselves. It will be the S. P. and S. and Union Pacific dealing with, as owners of Peninsula Terminal dealing with, S. P. and S. and Union Pacific. Now, as far as the way your application is set and, of course, you asked me about the statement you made that you are going to maintain the existing arrangements, and that to my mind contemplates Chehalis, Tacoma, Seattle, or any other place, and that isn't what we are looking forward to. We are looking forward to serving Portland and the Peninsula Terminal Company.

* * *

[579] Q. (By Mr. Devers) Mr. Cullen, on Page 6 in the testimony which has been the subject, I believe, of cross examination by Mr. Weisser, you say that the companies owning Peninsula Terminal can obtain traffic rights by mutual agreement over Peninsula so that industries served by Peninsula are on-line industries for them. Is it your understanding that that could be done without I.C.C. approval? A. If the Union Pacific and the S. P. and S. were owning the Peninsula Terminal, I imagine they could work out things that would be satisfactory to the owners without any difficulty.

Q. By "mutual agreement", is it your understanding they could arrange to operate over the line of Peninsula Terminal without Commission approval? I just wondered how you looked at that. A. They could certainly work out a good many arrangements that would be mutually beneficial. Whether or not the type of—whether there had to be some Commission approval in certain instances, I am not sure, but I had in mind that as owning lines of the Peninsula Terminal they would be in a very advantageous spot of working out things to their own satisfaction.

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[583] E. GROSVENOR PLOWMAN
was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Delisi) Will you please state your name and address. A. My name is E. Grosvenor Plowman, my address is 48 Partridge Circle, Portland, Maine, 04102.

Q. Have you prepared three exhibits previously identified in this case as Exhibit 1, which is your statement, and accompanying exhibits, Exhibits 2 and 3? A. I have.

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CROSS EXAMINATION

Q. (By Mr. Weisser) Dr. Plowman, are the estimates contained [584] in Exhibit 2, ones you developed or were they developed by someone else? A. I developed them myself.

Q. I see. On Page 2-4 of your statement, the last sentence of the first paragraph you state, "Joint ownership of Peninsula is the first step in providing Rivergate with efficient railroad-type mass transportation." Was this your conclusion or someone else's? A. It was mine.

Q. This was not based on the D.M.J.M. reports? A. It was based on my personal studies which included study of the D.M.J.M. report.

Q. On Page 2-6, the last sentence of the top paragraph on the page saying, "Thus making possible direct and low-cost interchange between Milwaukee and Peninsula Terminal." Did you determine any traffic level that Milwaukee may be interchanging with Peninsula? A. This all depends, sir, on whether you are talking about Peninsula Terminal as it is today or whether you are talking about Peninsula Terminal if it becomes the northern gateway to Rivergate. If the latter, I would anticipate that the Milwaukee Railroad would have a great deal of traffic interchange at that point.

Q. If Peninsula remains as it is today, however, and is not used as the northern gateway to Rivergate, would there be [585] sufficient traffic to make, in your opinion, interchange by Milwaukee with its own people economical? A. My testimony has been directed entirely to the problem of the relationship of the Peninsula Terminal Railroad to Rivergate and to Rivergate's growth.

Q. I see, and should Peninsula not be used for a vehicle of entry into Rivergate then you would have no opinion as to the ownership of Peninsula Terminal? A. I could have an opinion but that would be all it is because I did not consider it.

Q. I see.

Now, on Page 3-2 of your statement, the bottom of the page, the sentence starting, "Bulk traffic moving in solid blocks of cars and fixed consist unit trains." Just how could unit trains be handled through Peninsula Terminal Company? A. Again if you were talking about the Peninsula Terminal Company trackage as it exists today, that would be one thing. If you were talking about Peninsula

Terminal trackage as redesigned for handling unit trains, that would be another. It is the latter that I have considered and I see no problem.

Q. However, if it were not redesigned it could not handle unit trains, could it? A. I heard testimony a day or so ago, I believe it was Southern Pacific testimony, to the effect that unit trains consisting of short cars, namely ore cars which I believe are [586] rarely over 30 feet long, could be handled on the present curvature of the present Peninsula Terminal Railroad.

Q. Are you aware of the size or the weight of rail that Peninsula has? A. I have already testified that I have not considered the Peninsula Terminal Railroad as it exists today but rather as it would be redesigned.

Q. And your opinion is based solely on the testimony of a prior witness. A. I heard his testimony and I attempted to reproduce it.

Q. You are aware, then, that one plan that has been proposed is that the north end of Rivergate be served from a lead extending to the west of the S.P.&S. mainline from this mainline, have you not? A. Yes, sir.

Q. And if Peninsula were not used as the access to the north end of Rivergate this type of a lead would be the approach probably used, would it not? A. This is certainly one of the methods of redesign of trackage so as to permit access from North Portland Terminal to the north end of Rivergate. I would assume that it could be through Peninsula Terminal.

Q. When you say North Portland Terminal in your answer— A. (Interrupting) North Portland Junction.

Q. That general area rather than having a proper name to a [587] specific location. A. That's right.

* * *

[589] Q. (By Mr. Devers) Mr. Plowman, in answer to questions of Mr. Weisser it has been developed that there may be two alternative methods of serving north Rivergate by rail or perhaps two gateways as you used the term. Do you know how the D. M. J. M. report shows the north Rivergate will be served by rail? A. There are several different diagrams which differ slightly but I believe the diagrams that deal principally with the railroad network imply that there would be a curve track from the west side of the S.P.&S.; an elevated grade, around to the entrance to Rivergate approximately at the point where the Peninsula Terminal now enters Rivergate.

Q. Now, would you have an opinion as to the best way to serve Rivergate between operating over the lines of Peninsula [590] Terminal and taking off from the west side of the S.P.&S. track? A. You mean operating over the present line of the Peninsula Terminal?

Q. Over that line or as it may be developed. A. I believe it is possible and certainly in the event of redesign of the Peninsula Terminal trackage I am sure that the track engineers would consider an alternative proposal to the one that is shown in the D.M.J.M. report which would consist in removing the present track underneath the main line of the S.P.&S. and moving it south maybe five hundred feet or so and making a new, in effect, a kind of a viaduct or tunnel underneath the main line at that point. This would also be an entirely satisfactory way I would think for the access by Peninsula Terminal into Rivergate.

Q. Do you think that access method would be preferable to a connection from the, directly from the S.P.&S.? A. I think that is an engineering question primarily.

* * *

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[593] Q. Have you made a personal observation of this particular area, Mr. Plowman? A. Yes, sir.

• • •

Q. (By Mr. Green) But you do anticipate they will have to build perhaps passing tracks of up to one hundred fifty cars in time. A. Well, here is what we are dealing with. We are talking about the industrial area that can project Portland into the twenty-first century. It is going to have the finest [594] railroad track layout and the best access by all the railroads, the finest setup that can be imagined so my answer is yes, we must plan and think in terms of one hundred fifty car lengths for trains.

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WILLIAM S. DIRKER

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Delisi) Will you please state your name and business address. A. My name is William S. Dirker, Jr., Lindsay Building, Portland, Oregon.

[595] Q. Mr. Dirker, did you prepare Exhibit No. 4, your statement in this case, and Exhibits 5 to 21, inclusive? A. I did.

• • •

[596] (Intervener's Exhibit No. 5-A, Witness Dirker, was marked for identification.)

• • •

[597] A. Exhibit 5-A shows the location of industries within the Rivergate industrial district. I will describe these for your attention. Starting at the north end of the

exhibit in the column by a river you will see the words "Crown Zellerbach Poleyard" with a line extending down to a green cross-lined area in the northeast corner of Rivergate.

Now moving down to the northwest or actually west end of Rivergate along the Willamette River and starting at the bottom of the south end you see the words "Crown Zellerbach Water Waste Terminal". This is not cross-hatched as this transaction was just consummated yesterday and announced today. This is a new industry in Rivergate.

The next one to the north above that is designated as the Ashgrove Lime which is the 30-acre plot cross-hatched with the green lines.

Immediately to the east of that across North Rivergate Boulevard in the interior Rivergate is the Conmetco site, a division of Consolidated Freight Waste.

Back to the river and extending north about Ashgrove is the Collier Carbon and Chemical site, The general representative testified here previously.

Extending above that to the north is the 150-acre Oregon Steel Mill site who have also testified in this proceeding.

Q. I take it that all the industries have waterfront locations except Conmetco? [598] A. That is correct.

Q. Now would you also take your Exhibit 5-A, to what extent has the Port of Portland constructed rail facilities within Rivergate, the green area on the map? A. The port has constructed rail tracks from the connection with the railroad-owned tracks at the boundary of Rivergate and this is designated on this Exhibit 5-A as Point A with a circle around it. It is where the green and the yellow join just to the east of the Bonneville Power Substation at the boundary of the port-owned property. The port-owned track then extends generally west parallel—

* * *

A. (Continuing) The port-owned track extends from that Point A at their boundary generally west parallel to the boundary crossing North Rivergate Boulevard and then turning north and extending to the Oregon Steel Mill site previously designated. This rail track extends beyond the track shown on the map a short distance as the track was extended after the map was made.

Q. (By Mr. Delisi) Now, to what extent does the port own the [599] track and the roadbed in the green area? A. The port owns all of the right of way, roadbed and track in the Rivergate Industrial District except for that track within the private property sold or leased to private industry.

Q. Does any railroad own track within Rivergate? A. Unless it is within a private industry's plot, no, they do not.

Q. . . . Does the port have any agreement with any railroad company limiting the use of present or future tracks within Rivergate or limiting direct access to Rivergate to one or two or three railroads or less than all of the railroads serving Portlands? A. The port has no agreement with any railroad regarding rail service or rail facilities in the Rivergate Industrial District.

Q. Is there any limiting agreement of that carrier, any such agreement with the Union Pacific, the S.P.&S., the Southern Pacific, the Milwaukee, the Great Northern, the Northern Pacific, either singly, jointly or any other way? A. There is no such agreement of any kind.

Q. Mr. Dirker, what are the port's plans, if any, for a rail track between what Dr. Plowman calls the northern gateway, that is, the Crown Zellerbach Polevard territory and the area near Oregon Steel Mill's? [600] A. The port's planning consultant, D.M.J.M., has recommended that Rivergate be served by a large loop rail track system

connecting the southern gateway, if you wish, near the Barnes Yard to the northern gateway in the vicinity of the Peninsula Terminal Company. The port by its statement of policy has concurred in this concept and is proceeding to develop this, implement the concept of this plan.

Q. Could such a loop system connect with the Peninsula Terminal or with the S.P.& S. main line directly? A. Yes, it could connect with either as the conditions warrant and the engineering and cost elements are taken into consideration.

Q. Mr. Dirker, what is the extent of the landfill within Rivergate? A. Currently there are about four hundred acres filled to useable grade along the Willamette River. There is some land along the North Portland Harbor that is up to grade, perhaps a hundred or more acres and then along the Willamette River area behind the Oregon Steel Mill site and north of it is another some three hundred acres currently partially filled and under active filling now. The port's dredge Oregon, a very large 5,000 horsepower pipeline dredge is working this very day filling this land right now. As a matter of fact, the Port Commission has recently appropriated an additional $600,000 for filling in this fiscal year bringing to a total of [601] about a million and a quarter dollars their filling program for this year.

Q. What do you expect will be the probable period of completion of the landfill? A. The planning consultant recommended a face landfilling program that was balance against their estimate of the engineering requirements and of the marketing requirements, the general concept of the plan fill was to fill the exterior land, the waterfront land first because this is where the strongest market demand is for and it is easiest to fill. The remaining land in the interior would be filled in later years. Their program ran to the final small plot ending in about 1984. This land in

the exterior that was to be filled first is waterfront, water oriented industrial land that is in a regional competitive market or even a national competitive market and has a very strong demand and I think that has been evidenced by the sales made recently.

The interior land is land that is suitable for distributive and warehousing purposes. This land is in the competitive market within this metropolitan area. Our consultants estimated that this would, the competitive land would become scarce in the 1980's and that this interior land then would become competitively attractive and at that time facing they also then planned the freeway system which would make this distributive land attractive.

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[602] CROSS-EXAMINATION

Q. (By Mr. Devers) Mr. Dirker, does your Exhibit 6 show this new plan recommended by D.M.J.M.? A. Yes, sir.

Q. And this plan has been adopted by the port? A. No. This is the planning consultant's recommendation. The policy of a northern and a southern gateway and a loop concept has been adopted by the port.

Q. Is this the identical plan which is shown in the D.M.J.M. report which was prepared for and given to the port? A. I believe this is one of their transparencies that have been reproduced, yes, sir.

Q. And Rivergate is shown outlined in a dotted black line, is that correct? A. That is correct.

Q. On Exhibit 6. A. That is correct.

[603] Q. And in the northeast top of the exhibit is shown two alternative methods of access to Rivergate, is that correct? One from the S.P.&S. main line and one from Peninsula Terminal? A. That would appear to be the case, yes. I am not certain that that rail line in their

proposal, however, is the exact alignment of the present Peninsula Terminal Company.

Q. Well, but in their proposal did they show as part of their loop plan these two alternative methods of serving Rivergate by rail? A. I believe, and it is just my opinion of what the consultant's recommendation is that what they show is not an alternative but two accesses connecting.

Q. I see. Was there a recommendation in the D.M.J.M. report as between these two methods? A. They did not identify them as alternatives.

Q. Did they recommend that there be two accesses to Rivergate at this point in the norm? A. They presented this map without discussion.

Q. Without discussion? A. Right.

Q. Does the port have a recommendation as between these two? A. No, sir, we have not made these studies at all.

Q. Is the port suggesting that both methods of access be constructed? [604] A. The port just has not studied the details of this.

Q. Well, the port is certainly interested in access to Rivergate. A. Very vitally.

Q. And without waste, I believe. A. Yes, sir.

Q. Well, in your judgment do you believe both of these methods would be desirable? A. I have not made any analysis of this.

* * *

[606] Q. I see. Now, with reference to your Exhibit 5-A you testified as I think has been testified before on this record that the port constructed the rail line between Point A and the termination of that line within Rivergate. A. Yes, sir.

Q. Is it the plan of the port to construct all railroad lines within Rivergate? A. That has been the policy to date but the policy of railroad track construction and operation has not been determined for the future.

Q. Is there a plan for financing that construction if the port determines to do so? A. That neither has been decided.

Q. Can you tell us approximately how far, how many miles it is from the North Portland Junction through this north gateway to Rivergate to the Oregon Steel Mills via this loop plan?

Mr. Delisi: I am not quite sure I understand your question.

The Witness: I don't either.

Mr. Delisi: From where, are you referring to 5-A?

Q. (By Mr. Devers) I am referring to your Exhibit 6. I want to know approximately how far it is from the North Portland Junction over the line of Peninsula Terminal through Rivergate to Oregon Steel Mills on this proposed loop plan. A. From the vicinity of the North Portland Junction, not precisely at it—

[607] Q. (Interrupting) I understand. A. (Continuing) —and not precisely over the Peninsula Terminal trackage and not precisely along this—

Q. (Interrupting) If it doesn't go precisely over Peninsula Terminal it has to go precisely over something, it would go precisely over the connection from the S.P.&S. A. The S.P.&S. line generally parallel to the river and circling around, as this loop projects and then extending back to the present port track in the vicinity of what is known there as Yard B on this Exhibit 6. It is about four point— about five miles.

Q. Well, now, in order to build that line you testified there is a large filling project required, is there water to be crossed by bridge? A. The Columbia Slough is a presently designated navigable waterway but there is a

project under way to deauthorize that as a navigable waterway and the hearings will be held this spring.

Q. Are there swamps to be filled? A. Yes, sir, in several places there are very low lying lands but the roadbed along which generally that shows here on this map as a railroad loop much of that has already been filled and is being filled right now.

Q. In your best judgment how many years from now would you say it would be before Oregon Steel Mills could be reached on [608] that route by rail? A. Our chief engineer of the Port of Portland has made an estimate that if the conditions warrant it, if it was required to provide service generally along this loop and connecting to the northern gateway the filling could be done, settlement take place and the trackage constructed in approximately one year.

Q. Is that the plan of the port? A. It is one of the options of the port.

Q. I mean is it presently within your planning that Oregon Steel Mills may be served through North Portland Junction within one year?

Mr. Delisi: Mr. Examiner, I submit that the witness has already answered the question, it is one of the options.

Mr. Devers: I think we are entitled to know what the port plans.

Mr. Delisi: It is one of the options, what more do you want?

Exam. Shoup: Overruled.

Q. (By Mr. Devers) How long does Oregon Steel Mills —strike that.

Would you say you could represent to the Oregon Steel Mills or Ashgrove or Collier Carbon and Chemical, that

within one year they may be served by rail over that route? A. Physically, yes, but we would have—

[609] Q. (Interrupting) Actually. A. There are many areas of negotiation that must be constructed, must be undertaken.

Q. Well, this fill program you said would be completed at an outside date of 1984, does that include any of the land that would be involved in such a route? A. The berm underlying the track, much of that has already been filled and, of course, the full fill program as I have mentioned to you before was based upon a balance of engineering and marketing factors but if the marketing factor is accelerated this fill program could be completed within the port's resources in about one-third of the time that the planning consultant recommended.

Q. I don't think I got, I received an answer to the question. Does that railroad group which you described reaching from North Junction to Oregon Steel Mills lie on a right of way that is included with any of the area that is to be filled no sooner than 1984? A. It could be filled within a year.

* * *

[610] ALFRED M. ESCHBACH

was sworn and testified as follows:

DIRECT EXAMINATION

[611] Q. (By Mr. Delisi) Colonel, will you give us your name and business address, sir. A. My name is Alfred M. Eschbach. My business address is Portland Public Docks, 3070 Northwest Front Avenue, Portland, Oregon.

Q. Colonel, have you prepared a statement for presentation in this case? A. I have.

Mr. Delisi: Mr. Examiner, that has been identified as Exhibit 22.

• • •

[612] CROSS EXAMINATION

Q. (By Mr. Weisser) Mr. Eschbach, there has been admitted in this proceeding by the previous witness, Exhibit 5-A. I wonder to clarify the record and perhaps my own understanding of the location of your facilities could you locate any or all of the facilities of the Dock Commission which you refer to on Exhibit 5-A either by marking the exhibit that is in evidence if others will stiptilate to that or by describing in your testimony where it is. A. I can describe it for you. The presently owned facilities of the Portland Public Docks shown on Exhibit 5-A are those facilities shown in a yellow cross-hatch on the Willamette River downstream approximately—I don't have a scale.

Q. It says Terminal No. 4 in the midst of it. A. This is not complete. The cross-hatching should extend to within about, for a matter of measurement, approximately one-half inch of the St. John's Bridge.

Q. To within one-half inch of St. John's Bridge? A. Yes, and that would be the present holdings of the Commission of Public Docks.

Mr. Merrill: Is that all on one side of the railroad track there?

The Witness: It is all on the river side of the Union Pacific Railroad track.

[613] Q. (By Mr. Weisser) Could any of these facilities be served from Peninsula Terminal Company? A. In its present location and as presently operated?

Q. Yes, could they be served from Peninsula? A. No

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MILTON A. MOWAT

was sworn and testified as follows:

* * *

[619] CROSS EXAMINATION.

Q. (By Mr. Tjossem) Mr. Mowat, your Exhibit 23-D, the examples of the rate application you show in that exhibit assumes, does it not, that Peninsula Terminal will be extended into the North Rivergate area? Let me ask the question another way. If, in fact, the S.P.&S. and the Union Pacific [620] upon acquiring ownership of the Peninsula Terminal elect not to extend that railroad into the Rivergate area and elect to extend a line from the S.P.&S. main line into Rivergate, would these samples of what would happen with the rates via Peninsula Terminal then be true? A. In some cases where routing was allowed by the Oregon Electric, then these rates would apply but where the routes are by the Southern Pacific, they would not apply.

Q. Well, the fact is—strike that.

If in fact the Union Pacific and the S.P.&S. do not extend Peninsula Terminal into the Rivergate area would the ownership, joint ownership of Peninsula Terminal and direct access thereto by the Southern Pacific or the Milwaukee actually give you any rate relief you are seeking as indicated by your Exhibit 23-D?

Mr. Wilson: Do you assume in your question that we have equal ownership in Peninsula Terminal and the Milwaukee?

Mr. Tjossem: Yes.

A. There would be no effect as far as I see it because you are not serving anyone in the Rivergate Industrial District if I understand the question correctly.

Q. (By Mr. Tjossem) And if Peninsula Terminal does not serve Rivergate then an industry locating in Rivergate would not have direct access to the Southern Pacific or the Milwaukee via that route, would they? [621] A. No, sir.

Q. So that if joint ownership is, joint acquisition by all four lines is ordered and the trackage rights requested are ordered and the owners then elect not to extend Peninsula Terminal into Rivergate you still would not be able to offer industries direct access by the Southern Pacific or the Milwaukee, would you?

Mr. Wilson: Are you assuming again that S.P. is an owner when you say the owner—

Mr. Tjossem (interrupting): I said all four owners.

A. You are correct.

* * *

[624] THOMAS W. DENCH

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Crabtree) Would you state your name, please. A. Thomas W. Dench, D-e-n-c-h.

Q. Where do you work, Mr. Dench? A. Public Utility Commission of Oregon.

Q. What is your address? A. 208 Public Service Building, Salem.

* * *

[627] Q. Referring, then, to Page 2 of Exhibit 56 for identification, can you explain why it was necessary to make the change in wording that you made there? A. After discussion with the Port of Portland officials they called to my attention that the actual ownership of the

trackage in the port—the actual ownership of the trackage in Rivergate was owned by the port although the service was jointly rendered by the Union Pacific and S.P.&S.

* * *

[629] CROSS EXAMINATION

* * *

[633] Q. (By Mr. Young) Are we to understand from the last sentence of your prepared statement that you support the position of the Milwaukee in this case? A. Yes.

Q. And you also support the application of Southern Pacific in this case? A. For access to Peninsula Terminal, yes.

* * *

[637] HOLLIS NENOW

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Watson) Will you state your name and address and who you are employed by and who you represent? A. My name is Hollis Nenow, address 2414 Northeast Floral Place, Portland, Oregon. I am the general chairman for the Brotherhood of Railway Clerks representing the clerks on the Portland Terminal Railroad. I also am employed full time by the Portland Terminal Railroad as a clerk.

* * *

[638] CROSS EXAMINATION

* * *

[649] Q. (By Mr. Wilson) Mr. Nenow, do you consider 30 hours a reasonable time and adequate service to move cars a distance of about 5.2 miles? A. I certainly do not.

* * *

[651] CROSS EXAMINATION

Q. (By Mr. Weisser) Well, I think the question was put to you by Mr. Wilson concerning 30 hours for delivering cars 5.2 miles. Now, in his question was no factual statement of what might take place between the time the cars are delivered and the time the cars are taken on to the next point. In other words, what took place besides transportation alone, do you have any knowledge of the work that goes on between the time the railroad is delivered cars and then they subsequently deliver them to the next interchange point.

* * * *

A. Well, I have an idea when you have several cars in a train of, let's say, 40 cars, and if they are spread out among these 40 cars it's considerable switching to get them out and into a designated track, and from that point they have to be taken out [652] to the industry or wherever it happens to be going, but like I have stated in my statement, I thought that the Southern Pacific could block these cars and send them direct to the Union Pacific or to the Portland Terminal Railroad and there would be no delay and the engine could hook on to it and take it out to the site. Or when it's delivered to the Portland Terminal Company, the terminal company would have to deliver it to the S.P.&S.

Q. (By Mr. Weisser) So your answer as to Mr. Wilson's question concerning the 30 hours would be represented solely to transportation time between two points which were 5.2 miles apart without regard to any classification or inspection or waiting to accumulate enough cars to run out with the load or other railroad practices, would it be? A. Well, my answer would be that any business

could be hurried up through an interchange point, that is if the cars were blocked and there was not switching required to get them out and take them to the designated area.

* * *

[666] EDGAR E. SMITH
was sworn and testified as follows:

DIRECT EXAMINATION

[667] Q. (By Mr. Watson) Mr. Smith, will you state for the record your name and address, occupation and who you represent in these proceedings? A. Edgar E. Smith, 5131 Southwest Orchid Street in Portland, Oregon. I am the general chairman of the Brotherhood of Locomotive Engineers on the Union Pacific Railroad, Northwest District Oregon Division.

Q. And how long have you been general chairman, Mr. Smith? A. I have been general chairman since 1959. Prior to that time I was a fireman and an engineer and presently hold a seniority date as a fireman of March 1, 1937.

* * *

[668] Q. Mr. Smith, in these proceedings we have had considerable testimony by operating personnel from the Union Pacific concerning the amount of congestion that they anticipate if the Southern Pacific should be granted bridge trackage rights from the East Portland to the Peninsula Terminal Railroad. Could you elaborate as to what, in your opinion, would be the added amount of congestion if this application was so granted? A. Well, of course, Mr. Watson, I have no way of knowing what the Union Pacific officers may have stated before, as I was unable to attend the meeting, however, I have been informed by many of our members, and having worked in the area

myself, that approximately 75 per cent of our freight trains operating over the Kenton line are delayed as a result of the congestion in this area. It's a little hard to indicate just exactly how much time is lost in this area, but I would say from 15 minutes to two hours and sometimes more. This is a result of the yard congestion, as you know, we have single-track operation between St. John's Junction and Troutdale, consequently it is a case of move when you can. If it's possible at all the crews coming into the Kenton area are advised to stay back at the upper end of Kenton so that the road crossings will not be blocked. However, this is not always possible, and there is a considerable number of private crossings serving industry in the Kenton area [669] and this is where we engage most of our difficulty. We have cases where the irate public, because of the crossings being blocked, anglecocks are turned, pins are lifted on the cars, and, of course, this then causes considerable delay. We also have at times more than one train moving into Portland at or close on another one's schedule and then, of course, we have no alternative that there has to be road crossings blocked at this time. The carrier has recently been moving freight when at all practicable up the Sullivan's Gulch, when they have the power, because of the grade, they do move trains up this way in order to keep from being congested in the Kenton area. However, I would say the biggest portion of your trains are moved by the way of Kenton. We have, of course, north end trains, switch engines, east and westbound freight trains east, all utilizing the tunnel between St. John's Junction and Kenton or Peninsula Terminal. We had anticipated putting on additional engines, instead of going on duty at Albina many of these engines were going to go on duty at Terminal 4, this is what our plan to start today. However, that was

stopped at the present time. But this was another reason we fooled along with the carrier that in order to utilize the working potential that was available that more engines would have to go on duty outside of Albina in order to get the work done in the most expeditious manner.

Q. Mr. Smith, by starting a crew at Terminal 4, this would re- [670] lieve the congestion from Albina to Terminal 4 by the crew that does this work now, wouldn't it? A. Yes, by starting engines at Terminal 4, they can work in the vicinity of Terminal 4 and on the St. John's line. Crews can move out of Albina on the St. John's line without going through the tunnel or the main line. Crews can also operate from Terminal 4 to the Barnes Yard and serve also the Kenton area.

Q. In this Kenton area you referred to, would you say this would include any future development of Rivergate area and the Peninsula Terminal Railroad? A. Would you restate that, please?

Q. I said, in this Kenton area that you referred to and Terminal 4 where the engines, you say additional engines would be started, would they be available to serve any future needs of the Rivergate area that has been mentioned in this cross examination? A. Yes.

Q. Then that would be a fact that they could more expediently handle the cars going to the Rivergate area? A. We would have the engines available without being blocked on the—where we have our congestion between Albina and Peninsula Terminal, right. I also failed to mention that another move that would be put into operation in order to cope with the congestion, road crews are setting out many cars, especially during the wheat movements at Kenton and yard use that takes [671] cars from Kenton to the Barnes area and also from there to Terminal 4. This allows these cars to never enter into Albina which would further congest the traffic in that area.

* * *

[672] Q. (By Mr. Watson) Mr. Smith, if the cars that the S. P. is handling to the Union Pacific at the present time was blocked by the S. P. going into the Albina yard, would there be a possibility that a Union Pacific could take those cars and expedite the movement to Peninsula Railroad without having to switch them out of these cuts of cars? A. Yes.

Q. In your opinion, this would shorten the time for delivery to Peninsula Terminal Railroad and the industries there? A. Yes.

* * *

[732] R. B. HARDIN

was sworn and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Weisser) Would you state your name, please. A. R. B. Hardin.

Q. What is your employment? A. I am assistant superintendent for the Union Pacific Railroad, organization division.

Q. What is your business address? A. 2525 North Larrabee Avenue.

Q. In Portland? A. In Portland.

Q. Is that address located within the Albina Yard of the Union Pacific Railroad? A. Yes, sir.

Q. What are your duties in your present position? A. I am a supervising operating officer. My prime duties are supervising train engine yard movements, other personnel on the railroad. My territory incorporates our entire organization division, from Seattle, Washington to Portland, Portland, Oregon and to Huntington, and Hinkle, Oregon, to Spokane and the S. I. Railroad.

* * *

[736] Mr. Weisser: Would congestion caused by Southern Pacific entry over tracks of Union Pacific cause the need for extra handling.

A. It is my understanding that the Southern Pacific, through Mr. Kilborn, has testified that they intend to handle a car or cars from Brooklyn to North Portland using the Union Pacific trackage from East Portland to North Portland Junction. If [737] this was the case, and since there are no main tracks through the Albina area, there are no running tracks through the Albina area, it would be necessary to have some track clear for the movement to North Portland, and the movement from North Portland back to the Southern Pacific. By taking away one of our classification tracks in the Albina area, this, of course, would result in our not being able to use that track for classification as we do now. And any time you take away any of the facilities in a terminal that does have congestion such as Albina does have, then you are interfering with your operation.

[738] Q. (By Mr. Weisser) At East Portland, are engine movements over the Union Pacific tracks taking place in this area, and if so, would you give us the details? A. Yes, there are engine movements in the area and between Albina and East Portland, and this movement is delivery of traffic via Union Pacific crews from Albina to the Portland Terminal Railroad. We have two from the East Portland terminal or East Portland Yard switch engines moving back and forth in this territory. We have adjacent to the tracks between East Portland and the south end of Albina two elevators [739] which require service and is not uncommon for each of them, there are two of them, for each of them to require service on each shift or three times in the 24-hour period. We, because of the con-

gestion between St. Johns and Peninsula Terminal; Peninsula Junction, have been running a number of our trains eastbound trains via the Sullivan's Gulch in order to keep them out of this congested area, and they operate into and out of the Albina Yard via this route. And this is also the route that the S. P. uses to deliver traffic from the Brooklyn Yard to the Albina Yard. And I would like to add in this connection that when it is necessary to furnish these elevators, the services that are located on this track between East Portland and the south end of Albina Yard, it is necessary to block off this track which, in effect, makes this a single track while this work is in progress rather than a double track.

[741] Q. Now, at East Portland interchange, is there an interlocker? A. Yes, sir.

Q. Is there a speed restriction when crossing that interlocker? A. Yes, there are restrictions, eight miles an hour while trains or an engine are moving within the limits of the interlocking plant.

Q. Does that mean the whole train has to go eight miles an hour while crossing the interlocker? A. Yes, sir.

Q. What is the speed limit on the train once the interlocker is cleared in the Albina Yard area? A. Via Sullivan's Gulch?

Q. No, through Albina Yard. A. The speed limit itself as stated in our timetables is 35 [742] miles an hour in yard limits. However, there are other restrictions which do tend and lend to cause the speed of trains and transfers to be less.

Q. What would be the operating speed because of these other restrictions in the Albina area? A. Well, the engineers are supposed to operate their trains and engines prepared to stop short of any obstruction or switch not

properly lined, or anything that might affect the movement of their train.

Q. Now, in addition to Union Pacific, use as you have described of the steel bridge do other railroads use that steel bridge and go through the East Portland interlocker? A. Yes, the Southern Pacific uses the East Portland interlocking plant and the steel bridge for movement of their trains and engines from Brooklyn to the Portland Terminal Railroad and return, the S. P. & S. operates out of their Hoyt Street Yard, move across the steel bridge into an area that they also serve in the East Portland area and they also use the same steel bridge.

Q. Are there passenger train movements of Southern Pacific over the steel bridge? A. Yes, sir.

Q. Now, on the Sullivan's Gulch area shown in green, are switch engines operating between those points and Albina Yards through the East Portland interchange? [743] A. Yes, we have engines assigned that work in the Sullivan's Gulch area because there are industries in the area that require service and we do have two engines, at least two in the 24-hour period that do work in this area and move in and out of Albina. They do go on and off duty at Albina, yes, sir.

Q. Does Sullivan's Gulch have any grade problems? A. Yes, there is a grade of one and two tenths per cent one mile east of the East Portland interlocking plant on the Sullivan's Gulch.

* * *

A. In reality this does reduce the speed of the train, as it leaves the interlocking plant, however, the most important thing on this particular grade is the fact that without more power than is really required to handle the trains eastbound we cannot operate the trains, all the trains we would like to up Sullivan's Gulch because it would be nec-

essary to add more engines to the trains, and as a result in some cases it is necessary for this reason to operate trains via the Kenton line.

Q. (By Mr. Weisser) Now, on this line between East Portland [744] and the south end of Albina, according to Exhibit 37, it shows close proximity to the river, is that true? A. Yes, it is close, it is right, and the banks of the river and there is barely room for the two elevators that I referred to to have their facilities between the railroad tracks and the river.

Q. And there are two tracks that run then between East Portland and Albina all the way? A. Yes, sir.

Q. Is there room for any more track? A. No, sir, because of the river on the west side and there is a high bank with interstate highway as well as motels and other things, there is no room for expansion between Albina and East Portland interlocker.

Q. Now, the Albina Yard itself has been described previously as a classification yard, would you tell me the general area from which traffic is drawn to take through the Albina Yard for classification and subsequent movement or just subsequent movement? A. We have traffic that we bring to Albina, as I said, from the Portland Terminal Railroad, we have traffic that is delivered to us from Brooklyn via the S. P., receive our trains that arrive from the east points as far as Kansas City, Council Bluffs, through our Salt Lake Freightway; some through the Pocatello area that come into the Albina area, we have [745] traffic that moves out of the territory between Hinkle and Spokane; and the S. I. Railroad that moves in from the east via the Sullivan's Gulch or the Kenton line. We have traffic that originates at industries within the Albina area itself, we have traffic that arrives Albina from our connections between Albina and Seattle, and we have traffic

that originates in the other switching territory in the Albina switching district.

Q. You mentioned you receive traffic from the Portland Terminal Railroad, where is that received? A. We pick up, Union Pacific handles transfers to and from the Portland Terminal Railroad. We interchange our cars at the depot yards and pick up the traffic from the Portland Terminal Railroad and handle it back to Albina.

Q. That is west of the steel bridge, across that bridge? A. Yes, sir.

Q. And the Union Pacific makes a switch move across there and back whenever picking up or dropping traffic? A. Yes, sir.

Q. Now, on up at the top of Exhibit 37 beyond the North Portland Interchange Yard shown a line of track that is jointly owned by the S. P. & S. and N. P., does Union Pacific have operating rights on that track? A. Yes, sir, that is the—what did you say, excuse me.

Q. Above the North Portland Interchange Yard on north, this one here (indicating). [746] A. Oh, yes. Union Pacific freight trains that operate between Albina and Seattle do enter this S. P. & S. main track at North Portland Junction. Our passenger trains that operate between Portland and Seattle use this same route except they do not pass through Albina, they use the S. P. & S. trackage to come out of Portland Terminal Railroad, but do use this same route north.

Q. Now, at the North Portland Junction with the S. P. & S. track there is an interlocker there? A. Yes, sir.

Q. What is the designation of that interlocker? A. That is the North Portland interlocker.

Q. Or junction? A. Yes, sir.

Q. Does this also have any speed restriction? A. Yes, but I can't tell you what the speed restriction is.

Q. When the trains operating on the track to and from the S. P. & S.—N. P. main line, have there been any delays experienced to your knowledge through this interlocker?

* * *

[747] A. It has been testified that the Union Pacific does operate five trains a day, five freight trains a day in each direction over the track that you referred to between Peninsula Junction thence through the North Portland Junction, onto the S. P. & S.—N. P. main track. There are passenger trains that operate on this, there are S. P. and, of course, N. P. & G. N. trains that operate on this main track.

Q. I think you said S. P. A. I meant the S. P. & S., N. P., G. N., passenger trains and freight trains, and it is not uncommon that there are delays at North Portland Junction on, not only our trains, but on trains of other railroads because of other trains using the track at the time. Whenever this happens to a Union Pacific train that is leaving the Albina Yard and going northbound to Seattle, Chehalis, Centralia, wherever it might be going, if it cannot get onto the S. P. & S. track it will hang back into the Peninsula Terminal territory and—

Q. (Interrupting) The junction territory? A. The junction territory.

(Continuing)—and will delay the operation using the [748] H line that was referred to earlier, or the movement following this particular train. I have, or I know of delays that have been as much as an hour, hour and twenty minutes and the like of that—

Q. (Interrupting) Just at that interlocker? A. Yes, sir.

Q. Tying up the whole main line? A. Yes, sir.

I would like to call this to your attention, this does hap-

pen, and we have an engine in the Kenton area that desires to make an interchange to the North Portland interchange tracks he cannot make a movement on this track because of the trains setting there. This has happened many times, and this does contribute to the delay in the territory.

Q. Yes.

Now, to direct your attention back to the Albina Yard proper, as shown on Exhibit 37, would you describe a little bit of the physical limits around the yard? A. Yes, the Albina Yard is bordered on the west by the Willamette River between the yard itself and the river there are certain industries. On the east it is bordered by the bluff and the interstate highway, and there is no room for expansion in the Albina area.

Q. Now, in addition to the territory you mentioned as being served out of Albina are there industries on Swan Island which— [749] A. (Interrupting) Yes, there are industries on the Swan Island and, in fact, this area is increasing all the time, and this area is served by engines out of the north end of the Albina Yard to and from that territory.

Q. Now, the St. Johns junction line that veers off to the west at St. Johns junction shown in green, I believe you testified to the industries served in that territory? A. Yes, sir.

Q. I see. Now, there has been testimony as to the tunnel that is depicted on Exhibit 37 and the line on the opposite side known as the H line running between Kenton and Barnes, and the turnout tracks which connect these two. Could you tell me if because of the curvature of these tracks there is any restrictions in speed in using the turnout tracks? A. Yes. One of the turnouts is a nine degree turnout and the other is a seven degree turnout, and they

are restricted to 15 miles per hour, and that restriction is the same as I stated concerning the East Portland restriction. The entire train has to be handled completely through the turnout before the speed can be increased.

Q. Yes. Now, is there any speed restriction on the track between Peninsula Junction and North Portland? A. No, sir.

Q. Is there a grade which tends to restrict the speed of trains?

* * *

[750] Q. (By Mr. Weisser) What is the grade, do you know, between the North Portland Junction and Peninsula Junction? A. No, it isn't a very heavy grade. I do not know what the grade is.

Q. Does it tend to impede train speed in anyway? A. It could.

* * *

Q. (By Mr. Weisser) Well, the trains as they depart Albina does tend in a northerly direction, then can either go due north and get onto the S. P. & S.—N. P. track, is that correct? A. Yes, sir.

Q. What other routes are available to trains leaving that way? A. They can move via the Peninsula Junction onto the Kenton line, or they can turn off and go to the Barnes Yard to Terminal 4 or use the joint S. P.—U. P. track into the Rivergate area.

* * *

[751] Q. Well, when you come down from the north, what directions can these trains operate? A. They can turn off onto the Kenton line, or into the Barnes area, or come into the tunnel to the Albina Yard.

Q. And are movements made of this nature that you just described? A. For them to go other than into the Albina Yard is unusual. When you are talking about—

you are talking about train movements, switch movements, the switch movements between North Portland Junction and the Albina do come into the Kenton area and do sometimes go into the Barnes area.

Q. Now, are there any other movements of trains or switch engines in this locality—

Mr. Wilson (interrupting): I will object again, that is too broad a question. I don't know what he means by this locality. I think the—

Mr. Weisser (interrupting): The locale of Peninsula Junction.

A. Yes, on the Kenton line, we have engines going on duty at Albina, and there are two engines on each eight-hour shift that serve the industries in this area. We have two switch engines each shift, each eight-hour shift that goes onto the Albina that does handle traffic to and from the Barnes Termi-[752] nal 4 area. These engines that work in the Kenton area do serve the industries to the west of the Peninsula Junction, and there are many moves back and forth, and this piece of track which has been designated as the H line, at the Kenton Yard, we have tracks which are used for the State Grain Inspectors for the purpose of inspecting the grain via the state which diversions are made and then it is necessary to segregate this grain as to its destination. In some cases it is necessary to handle the grain across the H line to the Barnes area for delivery to the terminal H elevators, and in some cases the grain is handled down to Peninsula Terminal and left for a pick up by northbound trains, and some cases the grain is brought into Albina Yard to be placed on other trains that might be departing for the north. There is a great deal of movement in the Peninsula Junction area because of the switch engines working in this territory, and the train movements through the territory.

Q. Now, on this line that goes through Barnes Yard into Peninsula Junction, it is service rendered to the Rivergate area? A. Yes, sir.

* * *

Q. Could you describe generally where they would be? A. Yes, the tracks take off from a point near the west end of, [753] or at the west end of the Barnes Yard, follow close by Swift Boulevard on in a westerly direction to the boundaries of the Rivergate area, from that boundary on into Ash Grove Lime and Cement and there is a track that we used to serve that industry.

Q. What other industries are located there that are served by Union Pacific?

Mr. Wilson: I think that is all in the record, I won't object.

Q. (By Mr, Weisser) Were those the industries who were shown on the exhibit tendered by Mr. Dirker yesterday? A. There are other industries that are being built close by the Ash Grove Lime and Cement, and it is my understanding that there is trackage, and that these industries can be served by use of this track from Barnes.

Q. Now, if Southern Pacific were granted rights between East Portland and North Portland, you testified that you would experience congestion with resulting delays, where would this occur? A. This would occur in the territory between St. Johns junction and Peninsula Junction, because this has been testified that this is a single track area. It has been testified earlier this morning that three out of four Union Pacific trains arriving Albina via the Kenton line are delayed as much as two hours, because of the congestion in the Albina [754] Yard in this area. These movements tend to delay the switch engine operations in this area, and we do experience overtime on our switch engines as a result of this congestion.

This is really the bottleneck of the Albina Terminal, the territory between St. Johns Junction and Peninsula Junction. This territory we have to give preferred handling to certain trains and as a result the switch engines and the lesser trains are delayed and there are overtime on switch engines, and I have found that it is not uncommon to have two hours delay on our switch engines besides the delay on the freight trains.

Mr. Wilson: Mr. Weisser, can you ask just for clarification, what witness it was who testified to these two hours delays of trains coming off the Kenton line?

The Witness: I heard it testified—

Mr. Wilson (interrupting) You said it this morning, I would like to know

The Witness: I heard it testified this morning, it was Mr. Smith who said this. However—

Mr. Wilson (interrupting): Thank you, that is all.

Go ahead.

Q. (By Mr. Weisser) What effect does the operating difficulties you experience or the operating difficulties that you experience between Peninsula Junction and St. John's Junction have, if any, on the operation of the Albina Yard? A. Well, it does have an influence on the Albina Yard, in that [755] you cannot have an even flow of traffic back and forth through the tunnel because of the congestion through the tunnel, and as I stated, it does cause overtime. Any time that a freight train arriving at Albina is delayed on the Kenton line arriving Albina, its final terminal time starts at the time it is stopped out there by a switch movement or an opposing train movement. Any time that the final terminal time starts there is an added expense put to the Union Pacific because of this condition.

* * *

Q. (By Mr. Weisser) Because of the length of the tunnel, how do your operations have to be conducted in that area? [756] A. Because of the length of the tunnel, and because of the signal arrangement on either side of the tunnel, it is necessary for this area to be open and free for movement completely through the territory because you cannot stop trains inside the tunnel because of the gaseous condition and the effect it might have on the employees. There is a signal just beyond the north portal of the tunnel near the Peninsula terminal and you have to have this route clear or you cannot start a movement into this territory. I would like to elaborate on this signal arrangement since I have mentioned it, if I may.

Mr. Wilson: I am going to object.

Exam. Shoup: Sustained. Let us have the questions and answers.

Q. (By Mr. Weisser) Are there any periods of time when the tunnel is free? A. Yes, there are periods of time, however, when I speak of the tunnel being free, I mean that the tunnel is open for operation for a period of 30 minutes or more, because it does take approximately 30 minutes or so to pass through this territory.

Mr. Wilson: What do you mean by this territory, let us make sure—

The Witness (interrupting): Between the Peninsula Terminal and St. John's Junction. Peninsula Junction and St. John's Junction, yes, sir.

[757] Q. (By Mr. Weisser) Now, directing your attention to the North Portland interchange, is there any congestion in the present operation of the North Portland interchange? A. Yes, there is congestion in this area because of the amount of traffic that moves in and out of this, and out of this interchange, and because of the movements between Peninsula Junction and the North Portland Junction.

Q. If Milwaukee and Southern Pacific were permitted access to North Portland, would this make the properties congested and cause delays? A. Yes, it would make the properties congested and cause delays, because if the Milwaukee was making interchange at the North Portland Yard and the Union Pacific crews showed up to make the pull and set out cars at the North Portland interchange track no doubt one of the crews would have to wait while the other performed their service.

Q. This applies also to Southern Pacific employees? A. Yes, yes.

Q. Now, if Southern Pacific were given trackage rights between East Portland and North Portland, could Union Pacific reduce any of the number of engines or crews that they presently operate? A. No, it would be very likely that they would have to increase the number of engines that they have operating in the Albina Yard in order to take care of further congestion that [758] they might have. And to substantiate what I am talking about, like I referred to earlier, that if we had to have a track clear for a movement through Albina Yard there would be further congestion and it would no doubt cause extra switching, extra handling of traffic in the Albina Yard, and they could not reduce any power.

Q. What about if Milwaukee were given rights into North Portland, would the Union Pacific be able to reduce the number of engines or crews it operates? A. No, sir.

Q. Now, could you point out on the Exhibit 37 where the North Portland Junction interlocker is? A. Well, it is right close to the connection of the track between Peninsula Terminal where it joints right onto the S. P. & S. main track, running in close proximity.

Q. Could anyone observe operations of the Albina Yard from that junction point? A. No, you could not see Albina Yard, the tunnel goes through a hill and I doubt if—

Mr. Wilson (interrupting): I would stipulate to that, Mr. Weisser, that you can't see from North Portland to Albina.

Q. (By Mr. Weisser) Can you see the operations of Peninsula Junction? A. Not very likely, there is almost a mile between these two points, three quarters of a mile or so, and it is very doubt- [759] ful that they could see even the signal indications.

* * * *

Q. (By Mr. Weisser) Has anyone from Southern Pacific ever contacted you concerning service deficiencies to North Portland? A. No, they have not contacted me.

Q. Well, concerning Exhibit No. 45 that was placed in evidence yesterday, the column on the exhibit P. T. to U. P. or S. P. & S. as shown would be the time that applies to Union Pacific, a Southern Pacific transfer train unhooked from its transfer at Albina, is that correct?

Mr. Wilson: I object to the question, this is not this witness's exhibit, it was completely explained on the record yesterday.

Exam. Shoup: Sustained.

Q. (By Mr. Weisser) The operations that take place between the time that Union Pacific obtains traffic from Southern Pacific and the time this traffic is tendered to Portland or Peninsula Terminal have been previously described in this record, have they not? A. Yes.

Q. So this would take place between the two times listed on [760] Exhibit 45, would they not? A. Yes, sir. As I understand that, the first column so far as the time is the delivery to Albina and the second time farther on over to the right is the time U. P. handles it to Peninsula Terminal Railroad.

Q. Now, in this first group of cars on the left hand half of the exhibit, the fourth one down, CP-296497, it shows the hours involved of 169. A. Yes, sir.

Q. Which is a little bit out of the ordinary, have you attempted to determine what happened on that move? A. Yes. I looked into this matter and I found that this car arrived in Albina from the Southern Pacific on a Southern Pacific Company switching record, and this was marked Barnes spur or Joslin Manufacturing Company and the car was handled to Joslin Manufacturing at Barnes, and, however, it was found that after we spotted it at Joslin Manufacturing Company that it belonged to the West Coast Hardware Company, Hardwood Company and the Peninsula Terminal Railroad.

Q. As to the next number shown over to the far right, third one down, there is 152 hours and 30 minutes involved in the movement from Peninsula Terminal back to Union Pacific, have you tried to determine what happened in that instance? A. Yes. This car was handled to Peninsula Terminal Railroad for Shifton Company on the Peninsula Terminal Railroad, and [761] returning to Albina, moved without a waybill, and upon arrival at Albina they thought it was an empty car because there was no bill with the car and it was placed on the conditioning or cleaning tracks, it was found to be a load and after investigation was made, we found that the bill was at the Southern Pacific Brooklyn Yard and the car was forwarded, which did result in this particular delay.

Q. In this the case, then, where Southern Pacific had the bill and we had no instructions on how to handle the car? A. Yes, and I understand that the Portland Terminal Railroad did not have instructions on how to handle the car.

Q. The Peninsula Terminal you mean? A. The Peninsula Terminal Railroad, yes.

Q. Now, could you direct your attention to car No. 22S71083, it is about the tenth one from the bottom, a movement from Peninsula Terminal to Union Pacific shows the hours involved of 167 hours and 20 minutes, did you investigate and determine what happened in that instance? A. Yes. This car arrived back into Albina, it was an empty car, it was placed on the Albina conditioning or cleaning tracks, was conditioned and it was forwarded back to the S. P. as an empty car.

Q. Now, as to other cars included on this exhibit, I will just go through some of these briefly, SP-674152, what was the situation on that car, Mr. Hardin? [762] A. This car was received in Albina on February 24, which was a Friday, and it was delivered to the Peninsula Terminal Railroad or North Portland interchange 3:50 p. m. on Sunday the 26th.

Q. Are there a number of others in a similar status where the delivery was made as part of a weekend with the date of delivery on a Sunday? A. Yes, we do not necessarily provide the same service to the interchange tracks at Peninsula Terminal Railroad on Friday night, and Saturday, and Saturday nights because of the fact that the industries do not work on those days and we do not always make deliveries on those days.

Mr. Wilson: Could you just tell us which cars for the record?

Q. (By Mr. Weisser) Would this include car No.—

Mr. Wilson (interrupting): Just ask the witness to give us the numbers.

Q. (By Mr. Weisser) Give us the numbers, Mr. Hardin, if you would.

Mr. Wilson: Then, the Commission can take offical notice of whether those are Fridays, or Saturdays, or Sundays.

A. S. P. 674132, S. P. 541281, S. P. 340428, S. P. 214762, S. P. 176 348, N. R. G 30156, S. P. 226, excuse me, 222043.

Q. (By Mr. Weisser) Now, if the Commission should deny the S. P. application could Union Pacific furnish adequate service [763] to the Rivergate area through Peninsula Terminal?

Mr. Wilson: I will object, the question has been asked and answered by other witnesses, the applicant's witnesses.

Exam. Shoup: Overruled, the witness may answer.

A. Yes, rephrase the question, give me the question.

Exam. Shoup: Next question.

Q. (By Mr. Weisser) Could you explain your answer, what type of service would be offered if Peninsula Terminal is used as a vehicle to get into Rivergate and Rivergate should develop as we have heard on this record?

Mr. Wilson: May I ask that you say what kind of service, are you referring to service by Peninsula Terminal, or are you referring to service between where Peninsula Terminal is on Southern Pacific at East Portland?

That is the only thing.

Mr. Weisser: They will take the relevant one, the one between Albina Yard and Peninsula Terminal.

The Witness: Yes, they can furnish service into the territory and will furnish service as required, or the demand might require.

Q. (By Mr. Weisser) At the present time is the service meeting the demand for service? A. Between Albina and—

Q. (Interrupting) And Peninsula.

A. Yes, yes. I have not had any complaints about the service. [764] Several of the examples that are shown on

this report for Exhibit 45 as delays, the cars arrived as empties in the Peninsula Terminal Railroad ahead of the time that the cars were ordered.

Q. What car numbers are those on Exhibit 45? A. S. P. 541679—

Q. (Interrupting) What date was that car ordered? A. Car was ordered on fourth month and the 14th day for the loading, the 4th and the 24th, and was furnished the 4th day, 4th month, and the 18th day or six days ahead of loading time.

Q. Have you other examples? A. A. D. M. 8080, arrived Portland—Peninsula Terminal Railroad on 4—2, it was ordered for 4-24 and it was furnished 4-22. The N. R. G. 30156 was ordered 4-18, and the car was furnished 4-16.

Q. As to car S. P. 210795, is there an error in Exhibit 45? A. Yes.

Q. Could you explain what it is? A. The time that the car arrived from U. P. to Portland Terminal Railroad was 3-6-67 at 5:30 a. m. You will note that this exhibit shows the car was set from Portland Terminal Railroad to U. P. on that particular day. Found that the car was available and picked up on 3-8-67, was delivered to the S. P. at 3-9-67, or 29 hours and 15 minutes instead of 65 hours and 25 minutes.

[765] Q. Now, in the column on Exhibit 45 that shows P. T. to U. P. or S. P. & S., have you determined what time this represents?

Mr. Wilson: I don't understand the question.

Q. (By Mr. Weisser) Is that the time that cars are spotted on the Peninsula Terminal trackage? A. It is my understanding that the time as shown in the column P. T. to U. P. or S. P. & S. is the time that the Peninsula Terminal Railroad Company sets that car to the interchange track to be picked up.

Q. Then switching service is offered on a set time basis or more or less a schedule at 6:30 a. m. or 1:30 p. m. as has been previously testified to? A. Yes, sir.

Q. That is when the pick ups were made?

Mr. Wilson: This is a U. P. witness, isn't it, not a S. P. witness.

You don't have any personal knowledge of that, do you, the pick up times of S. P. & S.?

Mr. Weisser: This is U. P. traffic.

Mr. Wilson: I thought your question was to S. P. & S. I think the witness misunderstood you, too.

Q. (By Mr. Weisser) Did you understand my question? A. I understood what I thought you meant was, as has been testified to that there is more or less a set time for the Union Pacific to pick up traffic at the Peninsula Terminal [766] Railroad, if that was your question the answer is yes.

Q. What are those times? A. 1:30 to 2 o'clock p. m.—

Mr. Wilson (interrupting): They are in the record.

Mr. Weisser: O. K., you may cross examine.

* * *

CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Hardin, were you in the hearing room when Mr. Baker the general manager of Union Pacific testified? A. Yes, sir.

Q. You heard his testimony as to the number of train movements, and switch cuts, and so forth which you read into the record? [767] A. Yes, sir.

Q. Am I correct that that is what you base your general testimony on today as to congestion? A. Yes, sir.

* * *

[770] Q. You do not disagree with your general manager that it takes, when he testified that it takes an average of 30 hours to move these cars from Albina to Peninsula, you don't differ with that, do you? A. No, I don't differ with that.

• • •

PETITION OF CROWN ZELLERBACH CORPORATION FOR RECONSIDERATION, AND REQUEST FOR FURTHER HEARING TO INTRODUCE NEW EVIDENCE.

• • •

"EXHIBIT A"

UNION PACIFIC RAILROAD COMPANY

DEPARTMENT OF TRAFFIC

1416 DODGE STREET OMAHA, NEBRASKA 68102

W. F. K.
MAY 12 1969

R. F. PETTIGREW
Vice President

At Salt Lake City
May 8, 1969

Mr. O. H. Stieber, G. T. M.
Crown Zellerbach Corporation
#1 Bush Street
San Francisco, Calif. 94119

Dear Ollie:

In connection with our recent meeting in Chicago with respect to service which can be afforded to your new operation in Rivergate on traffic interchanged with the Southern Pacific:

You will recall at that time I advised that a car ordered from the Southern Pacific before noon on Monday should be delivered to us at Albina prior to 6:00 A. M. on Tuesday for handling to Rivergate by way of Barnes Yard and spotted early Wednesday morning. Presumably the car would be loaded, billed and released by Wednesday afternoon and ready for pick-up by the Southern Pacific at Albina Yards Thursday afternoon, leaving that evening or early the following morning.

While we intend to maintain a car pool for your loading at either Rivergate or Albina after your operation is under way, the foregoing is the service that would pertain assuming daily releases up to 25 cars. If your releases are in excess of 25 cars, they would be pulled, for example, on a Monday evening, arrive Albina prior to 6:00 A. M., Tuesday, for delivery to the Southern Pacific who would pick up at either 9:00 A. M. or 1:00 P. M. the same day and leave their Brooklyn Yard Tuesday evening. The reason the service can be bettered when an excess of 25 cars is tendered is that we would run from Rivergate to Albina special, otherwise our crews perform additional work enroute.

This apparently is the best that can be consistently maintained at the present time, although after the operation is in effect, there is always the possibility that further refinements can be made. If there are additional details that you need or if I can be of any further assistance, I would appreciate such advice.

Warm personal regards.

Sincerely,

(Illegible.)

cc - Mr. F. E. Kriebel, V. P.-T.
Southern Pacific Company
65 Market Street
San Francisco, California 94105

SERVICE DATE
OCTOBER 31, 1969

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of October, 1969.

Finance Docket No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Upon consideration of the record in the above-entitled proceeding, of the petitions of Southern Pacific Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Port of Portland, The Public Utility Commissioner of Oregon and of Crown Zellerbach Corporation, for reconsideration of the report, 334 I.C.C. 419, and order of the Commission, Division 3, dated June 6, 1969, including various requests for further hearing and oral argument, and of joint reply thereto by applicants; and

It appearing, That the material matters set forth in the petitions have been considered by the Division and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, and that no showing has been made warranting reconsideration, further hearing or oral argument:

1. This proceeding also embraces Finance Docket No. 24890, Southern Pacific Co. Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co. —Common Use of Terminal Facilities—Union Pacific Railroad Co

It is ordered, That said petitions be, and they are hereby, denied, and that the order of the Division dated June 6, 1969, be, and it is hereby, made effective 20 days from the date of service of this order.

By the Commission, Division 3, acting as an Appellate Division,

H. NEIL GARSON
Secretary

(SEAL)

SERVICE DATE
NOVEMBER 26, 1969

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of November, 1969.

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF TERMINAL FACILITIES—PENINSULA TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF CERTAIN TERMINAL FACILITIES—UNION PACIFIC CO.

Upon consideration of the record in the above-entitled proceedings, including the petitions of Southern Pacific Company, Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, Public Utility Commission of Oregon, The Port of Portland, and Crown Zellerbach Corporation, filed November 12, November 13, November 17, November 12, and November 17, 1969, respectively, under the provisions of section 1.101(a)(a)(4) of the General Rules of Practice before the Commission for a finding that an issue of general transportation importance is involved; and

It appearing, That no issue of general transportation importance is involved in these proceedings:

It is ordered, That the said petitions be, and they are hereby, denied; and

It is further ordered, That the order of June 6, 1969, by Division 3, shall be effective 20 days from the date this order is served.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

Item 44

SERVICE DATE
DECEMBER 10, 1969

ORDER

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF TERMINAL FACILITIES—PENINSULA TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF CERTAIN TERMINAL FACILITIES—UNION PACIFIC CO.

POSTPONEMENT OF EFFECTIVE DATE OF ORDER

Present: VIRGINIA MAE BROWN, Chairman, to whom the above matter, which is the subject of this order, has been assigned for action thereon.

Upon consideration of the filing on or about December 3, 1969, of a suit, Civil Action No. 69-696, *Port of Portland, et al.* v. *United States, et al.*, in the United States District Court for the District of Oregon, to annul and set aside the order of the Commission, Division 3, of June 6, 1969, in the

above-styled proceedings, the effective date of which was heretofore established as December 16, 1969, and which suit also seeks an order of the Court temporarily restraining the Commission from implementing said order on December 16, 1969; and of the request of the Court that the Commission itself postpone the above effective date of said order pending determination by the Court of the merits of the Commission's order of June 6, 1969; and good cause appearing therefor:

It is ordered, That the effective date of the order of Division 3 of June 6, 1969, in the above-styled proceedings, heretofore established to be December 16, 1969, be, and it is hereby, postponed until further order of the Commission.

Dated at Washington, D. C., this 8th day of December, 1969.

By the Commission:

Chairman Brown.

H. Neil Garson
Secretary

(seal)

Endorsed:
Filed Sept. 1, 1970
George E. Juba, Clerk
By M. Hartzell
Deputy

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In The United States District Court
For the District of Oregon
Civil Action No. 69-696

Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Commission of Public Docks of the City of Portland, Oregon

Plaintiffs,

v.

The United States of America and Interstate Commerce Commission,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Southern Pacific Transportation Company, plaintiffs, hereby appeal to the Supreme Court of the United States from the order and judgment dismissing the complaint, entered in this action of July 9, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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By W. Harney Wilson

CERTIFICATE OF SERVICE

I, W. HARNEY WILSON, the attorney for plaintiff Southern Pacific Transportation Company, hereby certify that on this first day of September 1970, I served a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States by mailing the same in an envelope duly addressed with airmail postage prepaid to the following:

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W. Harney Wilson

Item 46

PORT OF PORTLAND, *et al.*,
Appellants,

v.

UNITED STATES.

No. 903

Appeal from the United States District Court for the District of Oregon.

Feb. 22, 1971. In this case probable jurisdiction noted.

(91 S. Ct. 865)

Supreme Court of the United States

No. 903 --, *October Term, 19* 70

Port of Portland, et al.,

Appellants,

v.

United States, et al.

APPEAL from the United States District Court for the District of Oregon.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

FILE COPY

Supreme Court, U.S.
FILED
OCT 26 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~9000~~ 70-31

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from The United States District Court for The District of Oregon

Jurisdictional Statement

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from The United States District Court for The District of Oregon

Jurisdictional Statement

Appellants The Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Southern Pacific Transportation Company appeal from the Judgment of the United States District Court for the District of Oregon entered July 9, 1970, dismissing the complaint by which appellants challenged an order of the Interstate Commerce Commission. Appellants submit this Statement to demonstrate that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Order and Judgment of the District Court for the District of Oregon is as yet unreported, and is reproduced as Appendix A hereto. The Report and Order of the Interstate Commerce Commission decided June 6, 1969, and reported at 334 I.C.C. 419, is reproduced as Appendix B. The Order of the Interstate Commerce Commission denying reconsideration and other relief dated October 24, 1969, which is unreported, is reproduced as Appendix C. The Order of the Interstate Commerce Commission denying that an issue of general transportation importance is involved in this proceeding dated November 21, 1969, is reproduced as Appendix D. The Recommended Report and Order of the Interstate Commerce Commission Examiner served September 24, 1968, which is unreported, is reproduced as Appendix E.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 2284 and 2321-25 to set aside an order of the Interstate Commerce Commission. The final judgment of the Three Judge District Court was entered on July 9, 1970 (Appendix A), and Notice of Appeal was filed with that Court on September 1, 1970. A copy of said Notice of Appeal is attached hereto marked Appendix F. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Drum*, 368 U.S. 370 (1962); *Dixie Carriers, Inc. v. United States*, 351 U.S. 56 (1956); *United States v. Capital Transit Co.*, 325 U.S. 357 (1945).

QUESTIONS PRESENTED

The Interstate Commerce Commission Order in issue grants the application of Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company to acquire control of Peninsula Terminal Company pursuant to the provisions of § 5(2) of the Interstate Commerce Act (49 U.S.C., § 5(2)), without providing that appellants Southern Pacific Transportation Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company be equal owners of and have access to the lines of Peninsula Terminal. Appellants contend that such an order is erroneous as a matter of law and urge that this Court consider the following substantial questions:

(1) Whether the Commission applied erroneous legal tests in reaching a determination of public interest.

(2) Whether the Commission erred in finding that service of Union Pacific Railroad Company and Spokane, Portland and Seattle Railway Company to and from Peninsula Terminal was adequate and sufficient.

(3) Whether the Commission's rejection of common use applications under § 3(5) (49 U.S.C., § 3(5)) of the Interstate Commerce Act was erroneous as a matter of law.

(4) Whether the Commission has sanctioned a violation of the antitrust laws by permitting Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company to acquire and control Peninsula Terminal without conditioning said approval upon appellants Southern Pacific Transportation Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company being equal owners of, with access to the lines of Peninsula Terminal.

STATUTES INVOLVED

Sections 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(d), 5(11) and 3(5)* of the Interstate Commerce Act, and the National

*49 U.S.C., §§ 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(d), 5(11) and 3(5).

Transportation Policy set forth in the Preamble to the Interstate Commerce Act. Said statutes are set forth in their entirety in Appendix G.

STATEMENT

By Application filed July 25, 1967, with the Interstate Commerce Commission and assigned Finance Docket No. 24679, Spokane, Portland and Seattle Railway Company and Union Pacific Railroad Company (hereinafter sometimes referred to as "SP&S", "Union Pacific" or jointly as "applicants") sought authority from the Commission pursuant to § 5(2) of the Interstate Commerce Act (49 U.S.C., § 5(2)) to acquire control of Peninsula Terminal Company (hereinafter sometimes referred to as "Peninsula") through acquisition of ownership of all of the issued and outstanding capital stock of that company. Peninsula is a small independent terminal switching carrier approximately 3.79 miles in length located near North Portland, Oregon. In this application it was stated that the western terminus of the tracks of Peninsula reached the northeasterly portion of the Rivergate industrial area in North Portland and that the proposed acquisition of Peninsula would enable applicants to provide rail service to this industrial area over lines of Peninsula. Rivergate industrial area is a 3,000-acre development on reclaimed land undertaken by the Port of Portland at the confluence of the Columbia and Willamette Rivers.

Thereafter, Southern Pacific Transportation Company (formerly Southern Pacific Company, hereinafter sometimes referred to as "Southern Pacific" or "SP") and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter sometimes referred to as "Milwaukee") by petition sought inclusion as equal owners in the transaction

pursuant to § 5(2)(d) of the Interstate Commerce Act (49 U.S.C. § 5(2)(d)). Milwaukee's Petition for Inclusion was contingent upon approval and consummation of the unification of SP&S with its parent lines and the latter's other subsidiaries in the Northern Lines merger, subject to certain conditions including Condition 24 requiring the merged company to grant to Milwaukee trackage rights for the extension of its freight operations between Longview Junction, Washington and the City of Portland and connecting carriers at Portland, including use of terminal trackage and facilities at Portland, owned by SP&S and its parent, Northern Pacific Railway Company. (See *Great Northern Pac. & B. Lines, Inc., Merger-Great Northern Ry.*, 328 I.C.C. 460 (1966); 331 I.C.C. 228, 357 (1963); *United States v. United States*, 296 F.Supp. 853 (1969); *United States v. I.C.C.*, 396 U.S. 491, 24 L.Ed.2d 700, 90 S.Ct. 708 (1970). Southern Pacific and Milwaukee each requested that as a condition to ownership of Peninsula applicants be required to variously grant use of certain terminal trackage at Portland so that Southern Pacific and Milwaukee could each operate directly to and from the trackage of Peninsula. Milwaukee filed a supplement to its petition for inclusion also requesting common use of said trackage as terminal trackage under § 3(5) of the Interstate Commerce Act (49 U.S.C., § 3(5)) and Southern Pacific filed two separate applications pursuant to said section, which were assigned Finance Dockets Nos. 24890 and 24891. These latter applications sought authority requiring the common use of terminal facilities of Peninsula and use of Union Pacific main line tracks from the Southern Pacific-Union Pacific track connection at East Portland, Oregon, to the tracks of Peninsula at North Portland, and in the alternative, an order requiring the common use of the terminal facilities of Union Pacific

between Peninsula and the Southern Pacific-Union Pacific connection at East Portland, Oregon.

Finance Dockets Nos. 24679, 24890 and 24891 were consolidated for hearing on a common record. Hearings were held in Portland, Oregon, from February 26 through March 1, 1968. Appellants The Port of Portland (a public agency created in 1891 by the State of Oregon) and Sam R. Haley, Public Utility Commissioner of Oregon, intervened before the Commission and offered extensive evidence to protect the public interest in providing Rivergate Industrial District, an area immediately adjacent to Peninsula, with adequate and economic rail service by the four line-haul railroads serving Portland (SP&S, Union Pacific, Southern Pacific and Milwaukee*).

The hearing examiner recommended the granting of the application of applicants for the proposed purchase and control of Peninsula on condition that Southern Pacific be included as a one-third owner with the further provision that upon consummation of the Great Northern-Northern Pacific merger the Milwaukee would be permitted to be a co-owner at that time. The examiner also conditioned the acquisition of Peninsula upon the providing of trackage rights for Southern Pacific and Milwaukee to reach Peninsula.

Exceptions were filed to said Proposed Report and Order by SP&S and Union Pacific and by Order dated June 6, 1969, the Commission (Division 3) reversed the Proposed Report and Order of the hearing examiner and granted the relief requested by applicants without conditions. Thereafter, a petition for reconsideration and request for oral argument was timely filed including a request by Crown Zellerbach

*Milwaukee does not yet reach Portland but has the right to do so pursuant to conditions prescribed by the Commission and approved by this Court in *Northern Lines Merger Cases*, 396 U.S. 491, 514-16, 24 L.Ed.2d 700, 90 S.Ct. 708, 719-20 (1970).

Corporation for further hearing to introduce new evidence; however, by order dated October 24, 1969, Division 3 of the Interstate Commerce Commission issued a report and order which denied reconsideration and refused further hearing. Thereafter, petitions seeking a finding that an issue of general transportation importance was involved were filed. Said petitions were denied on November 26, 1969.

THE QUESTIONS ARE SUBSTANTIAL

The Commission in reversing the hearing examiner and authorizing control of Peninsula by applicants without conditioning said control upon equal ownership by appellants Southern Pacific and Milwaukee with access to Peninsula, has committed reversible error. If permitted to stand unchallenged, it will have an important effect upon the administration of the Interstate Commerce Act and the result will be in direct conflict with the goal of Congress as set forth in the National Transportation Policy (49 U.S.C., preceding § 1), and the interest of the public will not be served.

1. The Commission applied erroneous legal tests in determining public interest.

Section 5(2)(c) of the Act (49 U.S.C., § 5(2)(c)) sets forth criteria to be considered by the Commission in passing on acquisitions of control by one carrier of another or by two or more carriers of another. The criteria include "the effect of the proposed transaction upon adequate transportation service to the public" and "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction". Under § 5(2)(d) (49 U.S.C., § 5(2)(d)), the Commission is authorized to require inclusion of other railroads upon equitable terms and upon a finding that the inclusion is consistent with the public interest.

Furthermore, the Commission has not only the power, but *the duty,* to impose conditions which satisfy the public interest. In *Atlantic C. L. R.R. v. United States,* 48 F.2d 239, 244 (1931), *aff'd,* 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932), after quoting from the pertinent portion of § 5(2), the Court said:

> "It will be noted that the commission was authorized, by the section quoted, to approve the acquisition by one carrier of the control of another by lease or otherwise 'on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.' *It is not only the right but the duty of the commission to impose such conditions as will make the acquisition in the public interest;* for, unless the acquisition is found to be in the public interest, the commission cannot authorize it. Chicago Junction Case, 264 U.S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667." (Emphasis added.)

Thus the Commission is charged with the duty of assuring itself that the ultimate result is in the public interest.

However, the Commission has applied erroneous legal tests to determine the public interest. In its decision, it erroneously restricted its consideration to the issue of which railroads should be authorized to control Peninsula. It did not consider the extensive public interest in adequate and economic transportation service to the publicly owned and developing Rivergate industrial area on the waterfront at Portland, Oregon, accessible to the Columbia-Willamette River system, the second largest river improvement in the United States. The Commission's casual treatment of Rivergate and its failure to treat Portland as one transportation entity illustrate its erroneous use of tests in determining the public interest.

a) THE COMMISSION IGNORED THE RIVERGATE AREA.

The Rivergate industrial area is the key to the public interest aspect of this case. Rivergate, a land area in excess of four square miles, lies at the confluence of the Willamette and Columbia Rivers with direct access to the 40-foot channels of the river development connecting the port of Portland with the Pacific Ocean. The land is owned and being developed by the Port of Portland Commission, a government agency. The area involves major public and private investment and appellant Port of Portland has already invested more than $5 million of public funds and it estimates that it will expend a minimum of $50 million in the development of Rivergate. Other public agencies are expected to invest over $200 million in response to the need for facilities. A conservative estimate of the ultimate public and private investment exceeds $500 million (Ex. 4, pp. 6-2 and 6-3).* The importance of the area is undisputed and studies made by appellant Port of Portland indicate that at full development 500 to 600 freight cars per day will be handled to, from or within the Rivergate area. (Ex. 1, p. 5-1)

Peninsula is a major entrance to the Rivergate area. As the Rivergate area develops, trackage from Peninsula will be extended to meet the needs of future shippers. Neither SP&S nor Union Pacific need Peninsula for their access to Rivergate (Tr. 124, Ex. 37), but by controlling Peninsula they can block appellants SP and Milwaukee from providing direct rail service to this important public development. (Tr. 278), (Tr. 217). Notwithstanding the presence of the publicly financed Rivergate Development and its obvious importance to the entire public of the Portland area**, the

*All references are to the record before the Commission.

**Rivergate was characterized by a consultant for the Port as follows:

". . . We are talking about the industrial area that can project Portland into the twenty-first century." (Tr. 593)

Commission in resolving the public interest factor refused to consider Rivergate, but contrariwise, confined its consideration solely to the small terminal switching carrier, Peninsula Terminal Company. The Commission stated:

> ". . . we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor." (334 I.C.C. 419, 433)

The Commission in taking such action abrogated the duty imposed upon it by Congress.

As stated in *Detroit, T. & I. R.R., Control,* 275 I.C.C. 455, 488 (1950):

> "In determining whether a proposed transaction is consistent with the public interest, consideration must be given to the public affected by the transaction and the effect of the proposal upon adequate transportation service to *all* parts of the public which would be so affected. . . ." (Emphasis added.)

In *City of Hialeah, Fla. v. Florida East Coast Ry., et al.,* 317 I.C.C. 34 (1962), the Commission said:

> ". . . In determining what is 'in the public interest' in a given case, as antecedent to the affirmative exercise of this broad grant of power, we must take into consideration not only the interests of the residents of the city of Hialeah, but the interests of the shippers using the service involved, the interests of the carriers, and the interest of the public in general." (p. 36)

Appellants The Port of Portland and the Public Utility Commissioner of Oregon made it crystal clear that joint ownership of Peninsula by all railroads serving Portland would promote the needed direct access to Rivergate. As Witness Dr. E. Grosvenor Plowman stated, "Joint ownership of Peninsula Terminal by all of Portland's line-haul

railroads is a first step towards providing Rivergate with efficient railroad-type mass transportation." (Ex. 1, p. 2-4) In other words, the public body which owns and is charged with developing the Rivergate area by use of public funds strongly believes that all line-haul railroads serving the Portland area should be allowed to serve the Rivergate area. In fact, the Port and the Oregon Public Utility Commissioner presented extensive evidence that all the Portland railroads must have direct access to Rivergate if Rivergate and the shipping public are to be provided with modern, adequate, economic and competitive rail service (direct operation of unit and semi-unit trains, elimination of complex terminal switching and its delays, maximum single-line routes with their better service, etc.). Only in this fashion can the public interest be served.

By restricting its consideration solely to Peninsula, a small and almost infinitesimal part of what this proceeding is really all about, the Commission clearly did not appraise public interest from the standpoint required.*

b) THE COMMISSION ERRONEOUSLY CONCLUDED THAT TREATMENT OF THE ENTIRE PORTLAND TERRITORY AS ONE TRANSPORTATION ENTITY WOULD ALLOW EVERY RAILROAD IN THE UNDEFINED PORTLAND AREA TO SERVE THE STATIONS AND INDUSTRIES OF ANY OR ALL OTHER RAILROADS.

As an added reason for finding that it was not in the public interest to allow all railroads to serve the Rivergate area, the Commission stated:

> ". . . If we were to adopt the hearing examiner's conclusion, [the examiner based his recommendations upon consideration of the involved area as a whole] we would be providing grounds for every railroad in

*It is significant that the statutory defendant, the United States of America, supported plaintiffs (appellants herein) before the Three Judge Court. It candidly admitted the Interstate Commerce Commission Decision was erroneous.

the undefined Portland area to seek to serve the stations and industries of any or all other railroads. . . ." (334 I.C.C. 419, 433)

Appellants submit this is the application of an erroneous standard to an unsupportable assumption.

Requests for inclusion in a transaction are governed by § 5(2)(d) of the Intrastate Commerce Act (See Appendix G). By the very language of the statute, only when there is a proposed transaction under § 5(2) of the Interstate Commerce Act is it possible for there to be a petition for inclusion under § 5(2)(d). Necessarily, this arises only in the situation of merger, purchase, lease or contract to operate the properties of another carrier or acquisition of control of another said carrier through ownership of its stock or otherwise. Thus, § 5(2)(d) has no standing independently and can only arise when and if an appropriate application is filed under § 5(2). In each case the Commission then determines whether or not the requested inclusion is consistent with the public interest.

Separate and apart from the granting of a request for inclusion is the power of the Commission to subject any approval in a § 5(2) proceeding to such terms and conditions as it shall find to be just and reasonable and consistent with the public interest. (49 U.S.C., § 5(2)(b)) See *M. & M. Transp. Co. v. United States,* 128 F.Supp. 296, 298 (1955), *aff'd,* 350 U.S. 875, 100 L.Ed. 762, 76 S.Ct. 102 (1955); and *Atlantic C. L. R.R. v. United States,* 48.F.2d 239, 244 (1931), *aff'd,* 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932). Similarly, this power to impose conditions arises *only* when there is a transaction proposed under § 5(2).

There was no request by appellants Southern Pacific or Milwaukee to serve the stations and industries of all other railroads and appellant Southern Pacific, as a railroad

presently serving the Portland area, has never asserted that its mere presence there gave it the right to serve all stations and industries everywhere within that undefined geographical area. To the contrary, all evidence in this proceeding has been pointed directly to the petitions for inclusion filed under § 5(2)(d) of the Act and to the requested condition for trackage rights. Unless and until there is some future transaction proposed pursuant to § 5(2) whereby inclusion or other conditions could be requested, appellants can conceive of no situation which could give rise to the Commission's expressed fear. In any later proceeding, the Commission obviously has full power to either grant or deny requested conditions based upon the evidence adduced.

The Commission's determination that treating the entire Portland area as a transportation entity would allow every railroad in the area to serve the stations and industries of all other railroads is based upon an erroneous legal standard and upon an improper assumption. This mischaracterization of the legal result of granting appellant railroads' requests appears to have been a determining factor in denying their petitions for inclusion under § 5(2)(d) and for requested conditions under § 5(2)(b) of the Act.

2. There is no substantial evidence to support the Commission's conclusion that service of Union Pacific and SP&S to and from Peninsula is adequate and efficient.

In determining public interest in a § 5(2) transaction the Commission is directed by Congress to give weight, among other things, to "the effect of the proposed transaction upon adequate transportation service to the public". 49 U.S.C., § 5(2)(c).

This Court has pointed out that in a § 5(2) proceeding "public interest" is not "a concept without ascertainable criteria but has direct relation to adequacy of transportation service, to its essential conditions of economy and

efficiency, and to appropriate provision and best use of transportation facilities." (*New York Central Securities Corp. v. United States*, 287 U.S. 12, 25, 77 L.Ed. 138, 53 S.Ct. 45, 48 (1933).) In this proceeding, appellants Southern Pacific and Milwaukee seek inclusion as equal owners of and access to Peninsula so that they may serve industries in the developing Rivergate area. SP&S and Union Pacific presently reach the Willamette River or west side of Rivergate. Peninsula is immediately adjacent to Rivergate on its Columbia River or east side. Nonetheless the Commission in its decision characterizes the requests for inclusion as "invasion of the joint applicants' territory". The Commission then cites its well-established rule that:

> "... a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. ..." (334 I.C.C. 419, 433)

Thus, the test to be applied in determining whether a carrier already serving the area should be allowed to handle all traffic without competition from a new operation is whether it can adequately, efficiently and economically handle all present and future traffic in the territory. E.g., *Northern Pac. Ry. Constr.*, 295 I.C.C. 281, 294 (1956). If the carrier or carriers already serving the area cannot do so, they are not entitled to exclusively serve the territory. Rather, the public interest compels inclusion of other railroads desiring to serve the territory. Appellants unequivocally state that the record in this proceeding is patently clear that the Union Pacific and SP&S are not providing adequate and efficient service to Peninsula today and that they will not provide such service in the future.*

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*Union Pacific even admitted to shipper Crown Zellerbach that a 48-hour delay would be encountered in the future. See Crown Zellerbach Petition for Reconsideration and Further Hearing Exhibit A.

Appellant Southern Pacific introduced the results of a ten percent random sample showing the extraordinary length of time taken by Union Pacific and SP&S in delivering Southern Pacific cars destined to or from Peninsula during the year 1967. (Exhibit 45) Furthermore, the General Manager of Union Pacific admitted that it took approximately 30 hours for Southern Pacific cars to move from Union Pacific's Albina Yard to the North Portland interchange, a distance of approximately 5.2 miles. (Tr. 181-82)* The examiner in his report characterized this average transit time as "incredible". (Sheet 42) The record reveals unanimous agreement that such service was inadequate.

(1) The Traffic Manager of SP&S so testified. (Tr. 276)

(2) The Vice President and General Manager of SP&S was also critical of the service. (Tr. 87)

(3) The witness on behalf of the Brotherhood of Railway Clerks agreed that 30 hours was not a reasonable time nor adequate service. (Tr. 649)

(4) Shipper witnesses also agreed as to the inadequacy of this service. (Tr. 393)

In short, there was not a single witness who would venture to state that the present service being provided by Union Pacific between Albina and North Portland was adequate or efficient service.

There simply is no substantial evidence to support the Commission's finding that Union Pacific and SP&S are providing adequate and efficient service to Peninsula. The Commission's characterization of appellants' requests as an "invasion of the joint applicants' territory" ignores the fact that the Rivergate area is publicly owned and being developed with public funds. Furthermore, there is a long

*Contrast this 30-hour transit time with the same witness's testimony that the direct move could be made in approximately 45 minutes. (Tr. 211)

line of authority that a common carrier railroad is not entitled to exclusively serve a territory and has no exclusive right to present and future rail traffic. *Chesapeake & O. Ry. Constr.*, 267 I.C.C. 665, 679 (1947). As the court stated in *Pennsylvania R.R. v. United States*, 40 F.2d 921 (1930):

> ". . . It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a noncompetitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in. . . ." (p. 925)

3. The rejection by the Commission of common use of terminal facilities pursuant to § 3(5) of the Interstate Commerce Act was based on erroneous conclusions of law.

The Commission's rejection of the applications filed in Finance Dockets Nos. 24890 and 24891 pursuant to § 3(5) of the Interstate Commerce Act is found in the following language:

> ". . . The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which

had been removed to a new location.[11] In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use." (334 I.C.C. 419, 435)

"11. This case was cited by SP in support of an allegation that an invasion of territory may be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation."

The fact is the Commission completely failed to deal in its report with the situation presented by the Application in Finance Docket No. 24891. That Finance Docket sought the common use of terminal facilities of Union Pacific between Peninsula Terminal Company and the Southern Pacific-Union Pacific connection at East Portland, Oregon. (Application, p. 5) Union Pacific trackage, over which bridge rights were sought, are themselves "terminal facilities" within the statute. This is settled by the decision in *Seaboard A. L. R.R.—Use of Terminal Facilities*, 327 I.C.C. 1 (1965), where the Commission held:

". . . The East Coast tracks involved herein, being used as they are entirely for serving shippers in the City of Miami and the area of the port, can themselves be considered terminal facilities; . . ." (p. 3)

And on appeal, a Three Judge Court held:

". . . the tracks owned by East Coast and sought to be used by Seaboard are 'terminal facilities' within the meaning of § 3(5). Accord, City of Milwaukee v. Chicago & N. W. Ry., 283 I.C.C. 311 (1951)." (256 F.Supp. 986, 989 (1966))

The case was affirmed by this Court at 386 U.S. 8, 17 L.Ed.2d 699, 87 S.Ct. 851.

In support of its position, the Commission cited two cases. The first case, *Use of Northern Pac. Tracks at Seattle by Great Northern,* 161 I.C.C. 699 (1930), is an unusual fact situation; nevertheless, there is nothing in the case which holds that joint ownership was a necessity or a prerequisite to the granting of § 3(5) relief. The second cited case, *Seaboard A. L. R.R.—Use of Terminal Facilities, supra,* did not have the element of joint ownership of the facilities to which trackage rights were sought. To the contrary, Seaboard (the petitioner) did not have any ownership in the terminal facilities since they were owned entirely by the Dade County Sea Port Department. An attempt to distinguish the case on the ground that Seaboard had formerly served the old port prior to its relocation is in the view of appellants a specious argument. The relief granted by the Commission in the case stands in the face of the fact that Seaboard had no right to serve the new port and whether or not it had rights to serve the old port should have no bearing upon the matter. To hold otherwise could give rise to the following situation: If a large industry with numerous track facilities located exclusively on railroad *x* decided to move its location to an exclusive point on railroad *y*, then railroad *x* could claim that it was entitled under § 3(5) as a matter of right to reach the new industry location over the tracks of railroad *y*.

Furthermore, there is other authority that § 3(5) relief can be granted even though there have been no past rights or past ownership in the area sought to be reached. See *Erie R.R. Acquisition,* 275 I.C.C. 679 (1950). In that case the Erie sought authorization to acquire and operate former trackage of International Railway Company, which had been authorized to abandon the trackage. International Railway Company, by contract, operated over trackage of

New York Central to reach an industrial area called Lower Town. The agreement between International and New York Central was not assignable and Central refused to make a similar assignment with Erie. Erie then sought authority under § 3(5) of the Act for rights over the New York Central line into Lower Town. The Commission granted relief under § 3(5) and accorded Erie the right to operate over New York Central trackage directly to Lower Town.

Appellants submit that contrary to the Commission's holding there is no requirement that the railroad seeking relief under § 3(5) actually be entitled to serve the terminal facilities sought to be reached. *Erie R.R. Acquisition, supra,* clearly holds that ownership in or former service to a particular area is not required for the granting of relief under § 3(5).

4. The Commission sanctioned a violation of the antitrust laws by permitting SP&S and UP to acquire and control Peninsula Terminal without conditioning said approval upon appellants Southern Pacific and Milwaukee being equal owners of, with access to the lines of Peninsula.

It is settled that there is no direct application of the antitrust laws to corporate affiliations which are approved pursuant to § 5(2) of the Interstate Commerce Act, although antitrust principles must be considered in such transactions, *McLean Trucking Co. v. United States,* 321 U.S. 67, 88 L.Ed. 544, 64 S.Ct. 370 (1944). As explained in that case, § 5(11) exempts corporate affiliations considered and approved in § 5(2) proceedings from the antitrust laws only where the Commission makes adequate findings that such an affiliation is consistent with the public interest *and where such findings are adequately supported by evidence.* This Court summarized as follows:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competi-

tion which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry.... If the Commission did not exceed the statutory limits within which Congress confined its discretion and *its findings are adequate and supported by evidence, it is not our function to upset its order.*" (pp. 87-8) (Emphasis added)

As we have demonstrated, the Commission erred in focusing only on Peninsula to resolve the factor of public interest (*supra,* p. 8), and in finding the UP service to and from Peninsula adequate and efficient (*supra,* p. 13). These errors were used to justify finding the transaction consistent with the public interest even though appellants' petitions for inclusion and requested conditions for trackage rights were denied. To restrict rail service to Peninsula and the Rivergate area to only two of the railroads presently reaching Portland is not in the overall public interest and cannot be found to be consistent with the public interest.* Inasmuch as these erroneous findings are not adequately supported by evidence, the Commission has unlawfully sanctioned a violation of the antitrust laws and the immunity from antitrust legislation provided by § 5(11) of the Interstate Commerce Act has been lost.

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*Cf. *Illinois Central R.R. v. Norfolk & Western Ry.*, 385 U.S. 57, 17 L.Ed.2d 162, 87 S.Ct. 255 (1966), approving access by eight railroads to Lake Calumet Harbor Port in the Chicago area.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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By JEREMIAH C. WATERMAN
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Appendix A

In the United States District Court
for the District of Oregon

Civil No. 69-696

Port of Portland,
Sam R. Haley, Public Utility
Commissioner of Oregon,
Commission of Public Docks
of City of Portland, Oregon,
Plaintiffs,

vs.

The United States of America
and Interstate Commerce Commission,
Defendants,

Chicago, Malwaukee, St. Paul
and Pacific Railroad Company,
Plaintiff in Intervention.

ORDER AND JUDGMENT

The Court finds that the report and order of the Interstate Commerce Commission (Commission), Division 3, decided June 6, 1969, and the orders of the Commission, Division 3, dated October 24, 1969, and November 21, 1969, in its Finance Docket Nos. 24679, 24890, and 24891, Spokane, Portland & Seattle Railway and Union Pacific Railroad Company—Control—Peninsula Terminal Company, 334 ICC 419, are supported by substantial evidence and are neither arbitrary nor capricious;

Now, THEREFORE, the orders of the Commission are affirmed, and this action is dismissed.

Dated this 9th day of July, 1970.

John F. Kilkenny
United States Circuit Judge

Gus J. Solomon
United States District Judge

Robert C. Belloni
United States District Judge

Appendix B

Served June 20, 1969

F-9530

Interstate Commerce Commission

FINANCE DOCKET No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY —CONTROL—PENINSULA TERMINAL COMPANY

Decided June 6, 1969

1. In Finance Docket No. 24679, acquisition by the Spokane, Portland & Seattle Railway Co., and the Union Pacific Railroad Co., of control of the Peninsula Terminal Company through purchase of capital stock, approved and authorized. Conditions prescribed. Petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Co., and the Southern Pacific Co., for inclusion in the transaction denied.
2. In Finance Docket Nos. 24890 and 24891, joint use, under section 3(5) of the Interstate Commerce Act, by Southern Pacific Co. of facilities of the Peninsula Terminal Company and trackage of the Union Pacific Railroad Co., found to be not in the public interest and applications denied.

Hugh L. Biggs, Charles W. Burkett, James Warren Cook, Richard Devers, Thomas H. Gonser, Randall B. Kester, F. J. Melia, Raymond K. Merrill, Warren H. Ploeger, Thomas H. Ploss, E. O. Schiewe, R. Paul Tjossem, John F.

1. This report also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co. —Common Use of Certain Terminal Facilities—Union Pacific Railroad Co.

Weisser, W. Harney Wilson and *Oglesby W. Young* for applicants and petitioners.

Lloyd A. Combs, Dale T. Crabtree, Samuel P. Delisi, William M. Dunegan, John L. Green, Richard H. Kraushaar, Robert K. Little, Hollis Menow, Milton A. Mowat, Harold A. Ross, Richard W. Sabin, Robert W. Skirvin, Edgar E. Smith, Lofton L. Tatum, Robert Y. Thornton, Homra C. Watson, Milton A. White and *Henry M. Wick, Jr.*, for protestants and interveners.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, DEASON, AND STAFFORD

STAFFORD, *Commissioner:*

Exceptions to the hearing examiner's report and recommended order have been filed jointly by the Spokane, Portland and Seattle Railway Company (SP&S) and the Union Pacific Railroad Company (UP), separately by UP, the Southern Pacific Company (SP) and the Brotherhood of Locomotive Engineers (BLE). Replies to exceptions were filed by SP&S and UP (joint applicants), SP, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), the Port of Portland (the Port), and the Public Utility Commissioner of Oregon (Oregon Commission). The applicants request oral argument. However, in our opinion the issues herein can be disposed of without hearing the parties orally and the applicants' request is denied. Our conclusions herein differ from those of the hearing examiner.

In the title proceeding, Finance Docket No. 24679, the joint applicants on July 25, 1967, sought authority under section 5(2) of the Interstate Commerce Act to acquire control of the Peninsula Terminal Company (Peninsula) through

the purchase of its entire capital stock in equal shares. By petition filed August 23, 1967, Milwaukee, under section 5(2)(d) of the act, seeks inclusion in the transaction for authority (1) to purchase one-third of the capital stock of Peninsula from its present owner upon the same terms and for the same per-share consideration as the joint applicants; (2) to pay one-third of the purchase price of two diesel locomotives sold Peninsula by the latter's present owner; and (3) to acquire trackage rights over tracks owned jointly by the joint applicants and connecting SP&S with Peninsula. By petition filed November 2, 1967, and amended petition filed November 29, 1967, SP seeks inclusion in the transaction (1) as an equal joint owner of Peninsula; (2) as a condition to such joint ownership to acquire trackage rights over UP's main line between the UP-SP track connection in UP's East Portland Yard (the present Portland terminus of SP) and Peninsula in North Portland, via UP's Albina Yard, St. John's Junction, the UP tunnel, Peninsula Junction and the UP connection with Peninsula, approximately 6.75 miles, all in East Portland, Oreg.; and (3) in the event the joint applicants decline to acquire ownership of Peninsula subject to SP's inclusion, for an order pursuant to section 3(5) of the act authorizing common use by SP and the UP track referred to in (2).

In Finance Docket No. 24890, by application filed December 21, 1967, SP seeks authority under section 3(5) of the act, for common use of the terminal facilities of Peninsula and bridge traffic rights over the line of UP described above between Peninsula and the UP-SP track connection in East Portland Yard.

In Finance Docket No. 24891, by application also filed December 21, 1967, SP seeks authority under section 3(5) of the act for common use of the terminal facilities of UP

between Peninsula and the UP-SP connection in East Portland Yard. The joint applicants, Milwaukee, SP and Peninsula are common carriers by railroad subject to regulation under the provisions of part I of the act.

The Parties

A detailed description of the railroad parties to these proceedings, their operations in the Portland area and their positions with respect to the applications and petitions involved herein are set out in excerpts from the hearing examiner's report appended hereto. These excerpts, to the extent they describe the common carriers involved in these proceedings, are adopted as our own and a detailed description of the railroad parties will not be set out here except as follows for clarity of discussion.

Peninsula.—This carrier was incorporated in Oregon on June 5, 1918. It operates approximately 3.79 miles of terminal switching railroad in East Portland, serving 14 industries, pursuant to authority granted in *Peninsula Term. Co. Operation,* 166 I.C.C. 597. Ownership of the entire 1,500 shares of its outstanding capital stock by its present owner, United Stockyards Corporation (United) was authorized on March 9, 1943, in *Stockyards Ry. Co. Control,* 254 I.C.C. 207.

The interest of the Port, SP and Milwaukee in the purchase of Peninsula's control by SP&S and UP is based on the fact that at the western end of Peninsula's trackage is the Rivergate Industrial District (Rivergate), consisting of about 2,942 acres of land owned, and under development, by the Port at the junction of the Columbia and Willamette Rivers, generally north of and adjacent to the corporate limits of Portland, Oreg. Rivergate has about 6 miles of

waterfront on the 40-foot navigation channels of the two rivers. Much of the Rivergate land is unoccuppied and has yet to be reclaimed. According to the Port, about 500 acres are filled to usable grade and another 300 are now undergoing filling by a pipeline dredge.

The Port's consultants, in an 18-month's study of the area in which Rivergate is located recommended, among other things, that a Rivergate rail system be constructed to connect with rail trunklines. Two alternate rail access routes to Rivergate include a route over existing tracks of the Port which connect with tracks jointly owned by the joint applicants entering Rivergate from the southwest and another route based upon the possible construction on the eastern side of Rivergate of an SP&S main-line extension or an extension of Peninsula's tracks into the area.

Six industries now occupy about 265 acres, or slightly less than one-tenth of the Rivergate area. On the west, or Willamette River, side of Rivergate are a chemical lime plant, occupying 30 acres; an aluminum foundry, 20 acres; an area packaging plant, 25 acres; an integrated steel mill, 150 acres; and since the closing of the record herein, a waterways terminal. The remaining industry is the pole-yard of the Crown Zellerbach Corporation (Zellerbach) located on the east, or Columbia River, side of Rivergate. Of the foregoing Rivergate industries, only Zellerbach is now served by Peninsula. It is served by means of its own industrial trackage, which connects with Peninsula's track. The remaining 13 industries served by Peninsula are located on, or adjacent to, its main and side tracks on the land which Peninsula occupies.

SP&S.—This joint applicant was incorporated on August 23, 1905, in the State of Washington. Its present name was adopted on February 1, 1908. It owns and operates a line

of railroad in Oregon and Washington. Its entire 400,000 shares of capital stock are held equally by the Great Northern Railway Company and the Northern Pacific Railroad (NP). It is presently involved with its parent carriers and another of their subsidiaries, the Chicago, Burlington & Quincy Railroad Company, in a consolidation of their respective systems. This consolidation has been approved and authorized by the Commission and is undergoing review by the United States Supreme Court. See *Great-Northern Pac. —Merger—Great Northern* 331 I.C.C. 228 and 331 I.C.C. 869 (*Northern Lines* case.)

As a condition to consummating the consolidation, the parties thereto are required by condition No. 24 of appendix L to the *Northern Lines* case (see footnote 5, infra) to provide access, to Milwaukee, via trackage rights, to the city of Portland, which has not heretofore been served by Milwaukee.

UP.—The other joint applicant owns and operates over 9,500 miles of track in the States of California, Colorado, Idaho, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, Washington, and Wyoming. Its outstanding capital stock is widely diversified and it is not controlled by any other carrier.

SP.—This carrier is a Delaware corporation owning and operating a line of railroad through the States of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. Like UP, its outstanding stock is widely diversified and it is not controlled by any other carrier.

Milwaukee.—The fifth and last common carrier involved here is a Wisconsin corporation operating a line of railroad in the States of Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Washington, and Wisconsin. Its principal transcontinental line extends from Chicago to Longview,

Wash., a point on the lower Columbia River 46-rail miles north of Portland. As previously stated, it will obtain access to the latter point, for the first time, via trackage rights granted by condition No. 24 in the *Northern Lines* case, upon consummation of the consolidation authorized in that proceeding. It is also presently involved in Finance Docket No. 24182, Chicago, Milwaukee and North Western Transportation Company — Consolidation — Chicago and North Western Railway Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company. This application has been heard and is pending decision by the Commission.

THE PROPOSED TRANSACTIONS

SP&S and UP.—As recited in the appendix, United is no longer interested in operating Peninsula. It has no preference with respect to purchasers of Peninsula but offered the property to SP&S as one of the railroads connecting physically with Peninsula. SP&S communicated United's offer to UP, the other physical connection. The two connecting railroads now propose to purchase, in equal shares, all of Peninsula's outstanding stock from United for $299,405 in cash, adjusted to reflect changes in value of Peninsula's property occurring between February 28, 1967, the date of the purchase contract, and the closing date of the transaction,[2] plus the sum of $70,000 to reimburse United for two switch engines it sold to Peninsula.

Milwaukee.—As indicated above and in the appendix, Milwaukee presently performs no physical operations to

2. The closing date of the transaction will be no later than the first day of the month following our approval of the purchase of Peninsula and the acceptance by the parties of any conditions we may impose in connection therewith.

and from Portland. However, with its entrance into that point authorized as an incident to consummation of the *Northern Lines* case, and upon its inclusion in this transaction, it plans to serve all the industries on Peninsula's tracks with no absorption of switching charges. Contingent upon the extension of its operations to Portland pursuant to the *Northern Lines* case, Milwaukee requests joint and equal ownership of Peninsula's stock with the other trunk-lines and considers joint ownership of Peninsula essential to its Portland operations insofar as the industries located on Peninsula and in Rivergate are concerned.

Milwaukee asserts that if its petition for inclusion is denied and the *Northern Lines* consolidation is consummated, its traffic to North Portland would move to Guild's Lake Yard, about 6 miles south of North Portland. The traffic would then be switched back to North Portland. This back movement, according to Milwaukee, would require an extra day in transit and be to Milwaukee's competitive disadvantage because the joint applicants, by virtue of their ownership of Peninsula, could fix Milwaukee's switching charges and direct operation of Peninsula to meet their own operating requirements rather than those of Milwaukee.

UP contends, in effect, that we lack jurisdiction to grant Milwaukee's petition for inclusion inasmuch as (1) Milwaukee is not a railroad "in the territory involved" within the meaning of section 5(2)(d) of the act;[3] (2) Milwaukee will

3. Section 5(2)(d) of the act provides that:

> The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

be unable to serve the Portland terminal area, even though the *Northern Lines* case is consummated, without further authority under sections 1(18) and 5(2) of the act; and (3) the tracks connecting Peninsula and SP&S are jointly owned by UP, SP&S and NP, therefore, since condition No. 24 of the *Northern Lines* case is not applicable to UP and since joint use of this track cannot be granted over UP's objections in these proceedings, Milwaukee would be unable to reach Peninsula. UP and SP&S contend that Milwaukee's joint ownership of Peninsula would be contrary to the public interest and UP alleges that such joint ownership and control would lead to cumbersome, confused and divided management and thus, would not be in the public interest.

BLE and other labor organizations oppose the Milwaukee petition because, if granted, it would reduce employment at other yards in Portland by eliminating switching and interchange operations.

SP.—As previously stated, SP requests a condition to approval of the SP&S-UP application providing for its inclusion as an equal joint partner in the ownership of Peninsula and as a condition to such ownership, trackage rights over UP's main line and the terminal trackage between Peninsula and the SP&S-UP track connection at East Portland. SP asks that it be authorized to use the UP trackage under section 3(5) of the act in the event either or both of the joint applicants decline to participate in the acquisition of Peninsula subject to the conditions SP requests.[4]

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4. Section 3(5) of the act provides, in part, that:
If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal

Also because of the permissive nature of our authorizations under section 5(2), SP filed its applications in the two embraced cases to assure common use of the terminal facilities of Peninsula and UP's terminal facilities between Peninsula and the SP-UP connection at East Portland and bridge traffic rights over UP's line between Peninsula's line and the connection between SP and UP, even though the joint applicants refused to consummate any authorization of their purchase of Peninsula.

Under its proposals, SP alleges that faster service to Peninsula's industries can be offered through its service and that it anticipates no operating difficulties or labor complications in connection with its proposals. It argues that Rivergate is unique in that it includes several thousand acres of publicly owned industrial land that depends upon the flexibility of rail service for successful development.

As in the case of Milwaukee's proposal, UP opposes SP's petition on the grounds that SP like Milwaukee is not a railroad "in the territory involved;" the management of Peninsula would become difficult and indecisive with four owners; and that ownership by the joint applicants would assure keeping the size of Peninsula's yard facilities and the cost of its operation at a minimum. UP opposes the operation by SP through UP's Albina Yard, that would result from the bridge trackage rights requested by SP,

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facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. * * *

because of the congestion it would create. It asserts that SP operation in the yard would result in uneconomical and wasteful conditions there and that operation of SP trains through Albina Yard is not practical because of the large number of trains already moving through the yard.

The labor organizations appearing in the proceeding oppose SP on the same grounds they oppose Milwaukee; the loss of jobs that would ensue from the petitioners' proposals.

Interveners.—The petitions and applications of Milwaukee and SP are supported by the Port, the Portland Commission of Public Docks, city of Portland and the Oregon Commission. The positions of these interveners are set forth in the excerpts from the hearing examiner's report appended hereto and need not be repeated here.

SP and Milwaukee, particularly the former, are also supported by Zellerbach, the Oregon Steel Mills and Collier Carbon & Chemical Corporation, all industries located, or preparing to locate, in Rivergate. Excerpts from the hearing examiner's report containing a discussion of their positions are also included in the attached appendix. The excerpts describing public agency and shipper interveners' positions are appended for information purposes only. The positions they reflect are not to be understood as having been adopted by us. Williamette Wood Products, Inc., Morrison Oil Company and Serendip Industrial Materials of Portland, Oreg., support the application of the joint applicants.

Hearing Examiner's Recommendations

In the title proceeding, generally, the hearing examiner recommends approval of the sale of Peninsula's stock control to SP&S, UP, and SP in equal shares, subject to sale by each of a one-twelfth interest to Milwaukee upon con-

summation of the *Northern Lines* case and the filing by Milwaukee of an application under section 1(18) of the act for authority to operate between Longview Junction and Portland. He would also grant the joint use authority requested by SP under section 3(5) of the act.

In the embraced proceedings, the hearing examiner would grant the applications of SP under section 3(5) of the act.

For the protection of railway employees, the hearing examiner recommends imposition of the conditions originally prescribed in *Chicago & N. W. Ry. Co. Merger,* 261 I.C.C. 672, 675 *(North Western* conditions), which provide that:

> During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.***

EXCEPTIONS TO HEARING EXAMINER'S REPORT

The parties filing exceptions to the hearing examiner's recommendations continue to press, on exceptions, the same general positions they adopted at the outset of these proceedings.

Exceptions of SP&S and UP.—The joint applicants contend that SP and Milwaukee are not "railroads within the territory involved" and that even if the *Northern Lines* case is consummated, Milwaukee, under the terms of condition No. 24(a) of appendix L to the *Northern Lines* case, and under the decision of the United States Supreme Court

in *Texas & Pac. Ry. v. Gulf, Etc.*, 270 U.S. 266 (1926), would be unable to serve Peninsula and the Portland area without first securing a certificate of public convenience and necessity permitting an extension of its line of railroad to Portland under section 1(18) of the act.[5] They contend that undue emphasis is placed on the future development of Rivergate and that the hearing examiner erroneously holds the Portland terminal area to constitute one terminal entity. They argue that the evidence does not support a four-way ownership of Peninsula, either from a general public or a shipper standpoint, and that common use by SP of the Peninsula and joint-applicant facilities is not in the public interest.

The replies of SP, Milwaukee, the Port and the Oregon Commission to the exceptions of the joint applicants are, like those exceptions, mostly reflections of the repliants positions from the outset of the proceedings and agree generally with the findings of the hearing examiner with respect to the petitions and applications of SP and Milwaukee.

Exceptions of SP.—The exceptions of SP are taken to details in the hearing examiner's findings relating to compensation for the use by SP of UP interchange trackage and access by SP over intervening UP trackage. The joint applicants, in reply, take a contrary view to the points raised by SP.

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5. Condition No. 24, and subparagraph (a) thereof, state:

24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission.

(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo [the consolidated carrier resulting from consummation of the Northern Lines case] between Longview Junction,

(footnote continued on next page)

Exceptions of BLE.—On exceptions, BLE reiterated its support for the acquisition of Peninsula by the joint applicants, which it considers to be in the public interest, and its objection to the petitions and applications of Milwaukee and SP. It also objects to the so-called *North Western* conditions recommended by the hearing examiner for the protection of employees and requests the imposition of "attrition" conditions similar to those imposed in the *Northern Lines* case.[6] If we consider that this case does not merit full attrition conditions, BLE requests the imposition of the so-called *New Orleans* conditions as prescribed in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271.

Whichever conditions are imposed, the BLE alleges that they should be extended to protect the employees of North Portland Terminal Company if the petitions and applications of Milwaukee and SP are granted since such grants would permit SP, in particular, to bypass North Portland terminal in serving Peninsula industries, to the detriment of the North Portland employees.

(footnote 5 continued)

Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree, or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers;

6. In previous reports, "attrition" has been held to mean that "no reduction in force of employees shall occur other than principally by death, retirement, discharge for cause or resignation." For simplicity, the phrases "attrition conditions," "attrition protection," or "attrition agreement" are used in Commission reports to reflect this concept. See *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.,* 328 I.C.C. 684, 715.

In reply to BLE's exceptions, the joint applicants allege that if they are authorized to acquire control of Peninsula, there will be little change in the operation of that carrier. Consequently, there will be little or no effect on railway employees and the *North Western* conditions recommended by the hearing examiner will afford sufficient protection to the employees.

Discussion and Conclusions

Title proceeding.—The record establishes that the purchase of Peninsula by SP&S and UP will be in the public interest. The joint applicants now connect with Peninsula and the present service by Peninsula to its industries will be unaffected by the substitution of joint applicant's control for that of United. Furthermore, it will be in the public interest for control of Peninsula to pass from the noncarrier, which no longer desires it, to carrier auspices and on this record the most logical owners would be Peninsula's connecting carriers. It does not appear from the record, nor does any party contend, that the purchase price for Peninsula, arrived at by the parties through arm's length bargaining, is unreasonable or that it would jeopardize the financial structure of the joint applicants. After due consideration we can find no reason for withholding approval of our authority for the purchase. However, no stock or securities are to be issued or any obligation or liability assumed in connection with such purchase without our prior approval under section 20a of the act.

Jurisdiction over petitions for inclusion.—We do not agree with the joint applicants' contention that because SP and Milwaukee do not physically connect with Peninsula, they are not "railroads in the territory involved" within the meaning of section 5(2)(d), and, therefore, that we lack

jurisdiction to require their inclusion in the title proceeding.[7] Our authority to require inclusion of another carrier in cases of this nature does not arise primarily from section 5(2)(d). Instead it arises from the power conferred upon us by section 5(2)(b) to impose terms, conditions and modifications to our section 5(2) authorizations.[8] The only test required by section 5(2)(b) of terms, conditions, and modifications is that they be just and reasonable. See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304, 326.

Section 5(2)(d) does not limit our conditioning power under section 5(2)(b) with respect to other railroads. It merely requires us to give weight to the petitions of "other railroads in the territory involved" and to include such other railroads in a transaction if the public interest for such inclusion is shown. Cf. *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. 780, 787-788. Accordingly, we may require the inclusion of SP and Milwaukee in the title proceeding, if we find such inclusion to be just and reasonable, i.e., in the public interest, regardless of whether either or both of the petitioners can meet the joint applicants' technical definition of a railroad or "railroads in the territory involved." Of course, the lack of any

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7. See footnote 3 regarding section 5(2)(d) of the act.

8. Section 5(2)(b) provides that

> Whenever a transaction is proposed under sub-paragraph (a) [to section 5(2)], the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.

physical connection is a factor for consideration in determining whether a condition requiring inclusion is just and reasonable.

We also disagree with the joint applicants' contention that without a certificate of convenience and necessity under section 1(18) of the act for an extension of its line of railroad to Portland, Milwaukee cannot be included in this proceeding.

Condition No. 24(a) to the *Northern Lines* case[9] grants Milwaukee the right to acquire trackage rights over Northern Lines track between Longview Junction, Wash., and Portland, Oreg., provided, of course, the consolidation authorized in the *Northern Lines* case is consummated. A certificate under section 1(18) of the act is necessary before a carrier can legally extend its operations over trackage not theretofore operated in interstate and foreign commerce. However, if the trackage is already operated in interstate commerce (in effect, it is already certificated), only section 5(2) authority is required. The lessee under a trackage rights agreement in such case merely succeeds to the right to operate the line, within the limits of the trackage rights contract, of the lessor railroad. See *International —G. N. R. Co. Trustee Trackage Rights,* 275 I.C.C. 27, 33.

The joint applicants are misinterpreting condition No. 24(a) by arguing that it requires applications (both of which, of course, would be subject to protests) under section 1(18) and section 5(2) before Milwaukee can extend its lines via *Northern Lines* trackage into Portland. As used in the condition, the language "Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg.," is only intended to emphasize the fact that Milwaukee is, in the

9. See footnote 5.

Northern Lines case, accorded access for the first time to Portland. The Commission did not intend, and did not state in condition No. 24, that Milwaukee must first seek approval under section 1(18) of the act for an extension of its line of railroad over *Northern Lines* trackage before it could request authority under section 5(2) to acquire the trackage rights necessary for its entry into Portland. The question of whether a certificate of public convenience and necessity under section 1(18) is necessary before railroad service can be extended by trackage rights over the line of another carrier was decided in the negative by the Commission over 20 years ago in *Chicago, B. & Q. R. Co. Control,* 271 I.C.C. 63, 66-67, and we can find nothing in the *Northern Lines* case to indicate that the Commission intended to reverse that longstanding precedent.

The decision in *Texas & Pac. Ry. v. Gulf, etc. Ry., supra,* cited by joint applicants in support of their section 1(18) argument was, of course, decided prior to the enactment of the Transportation Act of 1940, placing the regulation of trackage rights acquisitions under the provisions of section 5(2) of the act instead of under section 1(18) where such regulation had previously been vested. Accordingly, the cited proceeding is inapplicable to the situation here.

We are satisfied, and we so find, that it is within our jurisdiction to determine whether, on this record, SP and Milwaukee should be included within the transaction.

Merits of petitions for inclusion.—Though we possess the necessary jurisdiction to require inclusion of Milwaukee and SP in a four-railroad control of Peninsula and to authorize the common use of terminals and facilities requested by SP, such control must meet the public interest requirement before any condition we might impose in these respects can be found just and reasonable.

With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24.[10]

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10. Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of condition No. 24, if any, to Peninsula's tracks which would at that time be partially owned by the Northern Lines.

The hearing examiner concluded that the entire Portland territory is an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity. He felt that "divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area." Therefore, he based his recommendations upon consideration of the involved area as a whole.

We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within that undefined geographical area. Cf. *Nashville, C. & St. L. Ry. Construction*, 295 I.C.C. 363, 377. If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads. The resulting situation could well give rise to more problems and litigation and be more disruptive of growth and development of the area than the "divisive determinations" frowned upon by the hearing examiner. Therefore, we do not agree with his conclusion in this regard and for that reason we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor.

Confining our consideration of the terminal area involved to Peninsula, we find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory. In the past, the Commission has usually held that sound

economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic and is generally also followed in proceedings involving motor carriers. See *Minneapolis, St. P. & S. S. M. R. Co. Acquisition*, 295 I.C.C. 787, 802, and cases cited therein.

As shown in the appendix, SP shared, through connections and use of joint rates and routes, in only about 20 percent of Peninsula's traffic during 1966, and only about 17 percent during 1967. Milwaukee's share, also via connections and joint rates and routes, amounted to only 1 percent during those years. Permitting SP and Milwaukee to acquire access to, and equal ownership of, Peninsula and therefore participate in its existing traffic on a direct haul basis will, of course, allow those two railroads to increase their share of Peninsula's declining traffic (3,640 loaded cars handled in 1966 and 2,748 handled in 1967). These increased shares of SP and Milwaukee could only be at the expense of the joint applicants and the railway employees whose jobs would be eliminated by the direct service planned by SP and Milwaukee.

Only three of the 13 shippers located on Peninsula's line participated in these proceedings and they support the joint applicants. Two of these three desire present service to continue. Three shippers, all located in Rivergate, support SP. At the time of the hearing, only one, Zellerbach, was in actual operation and it does not oppose the joint applicants. Its interest appears to be in obtaining the maximum

amount of direct service in order to increase its car supply. It also believes that four-way control of Peninsula would result in the elimination of a 22-degree curve in Peninsula's line thereby permitting the use of longer cars than are presently used for its poles. Its complaint with regard to present service is that 64 percent of its pole shipments during the period between December 1, 1966 and November 30, 1967, incurred an average delay of 4.5 days each because of car shortages. The joint applicants reply that the drop-end gondola cars, supplied by the railroads for the movement of Zellerbach's poles, are special-purpose cars, not always immediately available. The record does not warrant a finding that car supply to Zellerbach under four-railroad control would be increased or that there would be any greater likelihood of track realignment.

The steel mill supporting SP was in the process of construction at the time of the hearing. According to the record, it appears to have been located in Rivergate in order to take advantage of the available water transportation. Although it is interested in developing an ore field near SP's line in California, its Rivergate plant was constructed in an area where the round trip unit-train SP service, for which it states a preference, cannot be instituted without major fill and track construction. The record does not establish that under four-railroad control, the other three carriers would be willing for Peninsula to incur the expense of new construction for the sole benefit of SP. Likewise, the record fails to establish that the steel mill would not develop the California ore field if SP's unit-train service were unavailable because of the joint applicants' control of Peninsula.

The third shipper supporting SP is the chemical company, also under construction in Rivergate at the time of

the hearing. The record shows it was located in Rivergate through the efforts of SP&S. It also intends to utilize water transportation for its inbound raw materials and water, truck, and rail for its outbound product. Its support of SP is apparently based on the general supposition that the more rail service it has into its plant, the better such service will be. It offered no particulars as to the superiority of SP service and does not contend that its operations will in any way be hampered if direct SP service is not received. In our opinion, and we so find, the evidence offered by the three shippers supporting SP's position, as well as the evidence offered by the petitioners themselves, fails to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically.

We have thoroughly considered the briefs and replies to exceptions filed by the public agencies participating in these proceedings. Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate. However, this objective, if achieved at the expense of the joint applicants as proposed in the instant proceedings, would be directly contrary to the precept of the Congress, embodied in its national transportation policy, to foster sound economic conditions in the transportation industry. The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership. We cannot find, therefore, that inclusion of SP and Milwaukee in the title proceeding would constitute a just and reasonable term, condition, or modification of the authority requested by the joint applicants.

Common use applications under section 3(5).—The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern,* 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities,* 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location.[11] In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use.

Since we find that the common use authorizations requested by SP under section 3(5) of the act should not be authorized for the reasons stated above, we need not reach the questions of whether common use of the facilities involved would be practicable or would substantially impair the ability of Peninsula and UP to handle their own business. Other contentions of the parties as to fact or law, both with respect to the title proceeding and the common use applications of SP, not specifically discussed herein have been given consideration and found to be without material significance or not justified.

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11. This case was cited by SP in support of an allegation that an invasion of territory may be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation.

Traffic conditions.—Although we find herein that joint control of Peninsula by SP&S and UP, through purchase of its capital stock, is in the public interest, Peninsula's present routings and interchanges should be maintained unchanged by the joint applicants. SP&S suggests that for this purpose it is willing to accept imposition of the so-called standard traffic conditions prescribed in *Detroit, T. & I. R. Co. Control,* 275 I.C.C. 455, 492. We believe that with some modification, these conditions will adequately serve their intended purpose in this case. Therefore, to protect the present routings and interchanges, our order herein will impose, by reference, the following traffic conditions:

1. Under the control of SP&S and UP, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission;

2. The present neutrality of handling inbound and outbound traffic to and from Peninsula by SP&S and UP shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through SP&S and UP without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise;

3. The present traffic and operating relationships existing between Peninsula, on the one hand, and, all lines reaching Peninsula through the lines of SP&S and UP, on the other, shall be continued insofar as such matters are within the control of SP&S and UP;

4. Peninsula, SP&S and/or UP shall accept, handle, and deliver all cars inbound, loaded and empty, without discrimination in promptness or frequency of service irrespective of destination or route of movement;

5. Peninsula, SP&S and/or UP shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways;

6. Peninsula, SP&S and/or UP shall refrain from closing any existing route or channel of trade with SP or Milwaukee on account of the transaction authorized in Finance Docket No. 24679, unless and until authorized by this Commission;

7. Consummation of the transaction authorized in Finance Docket No. 24679, shall constitute assent by the corporate parents of SP&S, the members of their respective systems, and any carrier resulting from consummation of the Northern Lines case, to be bound by these conditions to the same extent that SP&S is bound by these conditions; and

8. Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

Employee conditions.—The so-called *North Western* conditions recommended by the hearing examiner for the protection of railway employees are obsolete for transactions such as this and have not been imposed by the Commission for several years due to the uncertain protection they afford. In our opinion they are inadequate to protect the employees in this proceeding. It is our opinion, also, that the purchase of Peninsula's control by SP&S and UP will not affect employees to the extent that the attrition

conditions agreed upon by the carriers and employees in the *Northern Lines* case, and requested here by BLE, would be merited.

Instead, we believe that the *New Orleans* conditions, requested in the alternative by BLE, will provide sufficient protection and our order herein will impose, by reference, the conditions prescribed in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, for the benefit of railway employees of the joint applicants and Peninsula adversely affected by this transaction, subject, however, to the following arbitration provision in lieu of those now in the New Orleans conditions:

In the event any dispute arises with respect to the protection afforded by these conditions or with respect to their interpretation, application or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final,

binding and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

Inasmuch as the BLE's request for conditions to protect the North Portland Terminal employees is based on the contingency that SP and Milwaukee will participate in Peninsula's control, and since that contingency is precluded by our denial of the petitions and applications of those two carriers, there is no need to deal further with the matter, and the contingent request for the protective conditions is denied. Moreover there is no indication that the said employees come within the protective purview of section 5(2)(f).

Ultimate Findings

The acquisition by the joint applicants of control of Peninsula does not involve any guaranty or assumption of the payment of dividends or fixed charges and will not result in any increase in total fixed charges. The petitions of SP and Milwaukee for inclusion therein have been considered and disposed of and no other railroad seeks to be included. Adequate transportation service to the public will not be affected and railway employees will be protected by the imposition of the conditions we have provided in their behalf.

Accordingly, we find in Finance Docket No. 24679 that, subject to the conditions imposed herein for the protection of railway employees and traffic, the acquisition by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company of control of the Peninsula Terminal Company through the purchase of its entire capital stock in equal shares, as described herein, is a transaction within the scope of section 5(2) of the Interstate

Commerce Act, that the terms and conditions thereof are just and reasonable, that the transaction will be consistent with the public interest, and that the inclusion in the transaction of the Southern Pacific Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is not, for the reasons discussed herein, consistent with the public interest.

We further find in Finance Dockets Nos. 24890 and 24891, that the common use by the Southern Pacific Company of the terminal facilities of the Peninsula Terminal Company and a line of railroad of the Union Pacific Railroad Company and bridge traffic rights over the latter line, all as described herein, is not in the public interest.

An appropriate order will be entered.

APPENDIX

Excerpts from the report of the hearing examiner

* * * * * * *

Peninsula is a terminal railroad Oregon corporation subject to part I of the Interstate Commerce Act engaged in switching operations at North Portland, Oreg. North Portland is within the Portland switching district. Portland is a major deep channel seaport, transportation, and distribution center serving the Pacific Northwest and the Continental United States. The western end of Peninsula's main line extends to a Crown Zellerbach pole yard * * * at the eastern tip of Rivergate Industrial District (Rivergate) * * * affording potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings. Peninsula owns no tracks within Rivergate. It serves the pole yard by using industrial tracks of Zellerbach there. Peninsula was established as an essential for operation of Portland

Union Stockyards * * * to facilitate handling livestock, and to provide a rail connection between the stockyards and trunkline railroads serving the Portland area. * * * Swift & Company presently processes only agricultural chemicals, hides, and wool at North Portland and the volume of that activity is expected to decline. Crown Zellerbach Corporation (Zellerbach) recently acquired the North Portland Swift property and expects to establish a 200,000-square foot warehouse and an ink manufacturing factory there. Zellerbach also has its Flexible Packaging Division plant at North Portland and operates the above-described pole yard at the west end of the Peninsula line in the Rivergate area. Peninsula serves 13 industries on its line other than the stockyard. * * * Peninsula has become less important to Portland Stockyards and * * * [United Stockyards Corporation (United), Peninsula's present owner] has no interest in operating a railroad independent of stockyard operations. It therefore proposes to sell all of the stock in Peninsula at a reasonable price established through a 1962 appraisal by American Appraisal Company and has no preference as to the purchaser. * * * The agreed purchase price of Peninsula under a contract of purchase dated February 28, 1967, between United and SP&S and UP is a total of $299,405 for all outstanding shares of common stock of Peninsula plus a sum of $70,000 to reimburse United for two switch engines sold by United to Peninsula representing an unsecured account payable to United. Settlement to be made by checks of purchasers upon approval of the transaction. The appraisal was based on empty land, plus local costs of roadway and structures, less depreciation. Adjustment of the appraisal, at the time of contract of sale was made only as to rolling stock, working capital, and miscellaneous betterments. The president of Peninsula represents that the contract price is fair and reasonable.

Peninsula properties consist of 13.17 acres of land, none suitable for industrial development, 15,559 feet of main-line track plus spurs and sidings or a total of 3.79 miles of main-line and secondary and spur track laid on treated ties in sand with no rock ballast. The distance from one end of the line to the other is about 8,000 feet with a 5-foot elevation to its eastern end. The above-noted two locomotives owned by Peninsula consist of a 50-ton G.E. electric, and the other, a 70-ton Copper Bessimer electric, including tools and parts for operation and maintenance. Tools for track maintenance, a conveyance for workmen, a heated enginehouse for both locomotives, a yard office (14 feet by 23 feet 6 inches in size), and a sand house (11 feet by 18 feet in size) are also owned.

* * * * * * *

Peninsula receives cars directly from and delivers cars to SP&S, NP, UP, and Great Northern Railway Company (GN) (empty and loaded) at North Portland, which total [from 10 to 20] * * * cars daily handled through the North Portland Freight Station with an office located at the Portland Stockyards. The cars move to or from double main-line tracks jointly owned by SP&S and NP, extending from Vancouver, Wash., south across the Columbia River, through North Portland and across the peninsula at the junction of the Columbia and Willamette Rivers (the peninsula) to SP&S Doan Street Yard and the Portland Terminal Company's Guild's Lake Yard. At North Portland there is, among other things, a head block on the SP&S-UP tracks and a 259.5-foot track extending therefrom to four North Portland interchange tracks * * * [3 of] which accommodate from 30 to 35 cars each. One is used by Peninsula for receipt of cars from the trunklines. The second is used by Union Pacific to receive cars from Peninsula, GN, NP, and SP&S. The third is used by SP&S, NP,

and GN to receive cars from Peninsula and UP, and the fourth is an open or running track. Two of the interchange tracks are owned, one-half by Peninsula, and one-half jointly by UP, SP&S, and NP. The other two tracks are owned jointly by UP, SP&S and NP. The interchange tracks connect directly with Peninsula's main-line track to the north and also with a single-line track of [the Oregon-Washington Railroad & Navigation Company] (OWR&N), • • • [a wholly owned UP subsidiary], extending about 1.7 miles southerly across tracks of UP to Peninsula Junction, and thence about 2.6 miles through a tunnel near St. Johns Junction to Albina Yard. The interchange tracks are used by Peninsula, UP, NP, and SP&S as joint owners, and by GN under a contractual arrangement. The use includes interchanges between the four trunklines and also between those lines and Peninsula. • • • Service at North Portland is provided through a joint local freight agent of the trunklines who informs Peninsula of industry service requested as to outbound moves. The agent prepares the inbound interchange reports and Peninsula the outbound interchange reports. Outbound bills of lading of the four trunklines are signed by the joint agent. Expenses of maintaining the North Portland station are prorated among the four lines by car count, loaded and empty, with the joint-facility invoice prepared by the operating road, UP or SP&S. The joint agent recommends no routings for shippers and receives no open-route car orders. Usually there are four deliveries and two pickups daily of cars moving to or from Peninsula by SP&S or UP. Cars from Peninsula could move by UP to the pass near Peninsula Junction, to Kenton Yard (about 2.6 miles southeast of Peninsula Junction) or to Albina Yard. Cars picked up from Peninsula by SP&S usually move to Vancouver. In addition to the

above-described North Portland Freight Station, there is a yard office at the eastern end of the interchange tracks. The yard office is maintained jointly by SP&S and UP under terms of a 1912 agreement which established the North Portland Freight Station. Four clerks at the yard office are UP employees and four clerks at the North Portland Freight Station are SP&S employees.

Peninsula also provides local intraplant and intraterminal service. It has established local switching tariff No. 23, effective September 23, 1965 (not applicable to rail line-haul service), which among other things provides a $22.44 per-car charge for each car movement and service charges for the handling of livestock. No other switching tariff is published by it. Peninsula solicits no traffic and traces no shipments moving beyond its line. Revenue from its connecting rail carrier service is derived from a division of revenue, billed and collected by the trunkline, generally amounting to $29.25 a car when the car revenue exceeds $60. The agreed rate divisions were established by Joint Division Sheet 8-R issued by North Pacific Coast Freight Bureau, Seattle, Wash., effective July 1, 1964. Usually the line-haul carriers absorb the division charges. Its locomotives and crews operate two 8-hour shifts each day of the week, one from 9 a.m. to 5 p.m. and the other from 9 p.m. to 5 a.m. Light repairs of roadbed and equipment are made by regular Peninsula employees and heavy repairs by part-time employees. Since January 1, 1968, by agreement with Portland Livestock, Peninsula employees load and unload livestock.

Basic labor agreements were entered into by Peninsula on April 14, 1943, with the Brotherhood of Railroad Trainmen and on June 15, 1941 (since modified), with the Brotherhood of Locomotive Firemen and Engineers. Peninsula engineers are paid $29.05 or $32.68 a day for service ex-

clusive of repairs and maintenance with no holidays. They receive vacation and insurance benefits equivalent to employees of trunkline carriers. Switchmen receive $27.88 a day and the footboard yardmaster $30.21 with seven annual holidays, extra pay for work on holidays, and vacation, insurance and welfare benefits similar to the engineers'.

United has agreed to manage Peninsula after the purchase in accordance with policies of its director, including supervisory, accounting, stenographic and other necessary managerial services as presently provided. United may terminate the agreement on 6 months' notice and the purchasers may terminate it on 30 days' notice.

During 1960, Peninsula handled 4,993 loaded or partially loaded cars compared to 2,748 cars in 1967. The latter represents about 39 percent of all cars interchanged at North Portland. The other 4,300 cars were interchanged between SP&S, NP, and GN, on the one hand, and, on the other, UP. From 1960 through 1967, there was a decrease in movements of livestock and packinghouse products and an increase in wood products. For example, in 1967, 34 percent of the cars handled transported wood products, 33 percent chemicals, 8 percent livestock, 7 percent packinghouse products, 13 percent paper products, and 5 percent other. In 1960, 16 percent of the cars handled wood products, 8 percent chemicals, 48 percent livestock, 15 percent packinghouse products, 6 percent paper products, and 7 percent other.

The statement of assets and liabilities of Peninsula as of February 1967, reveals total assets $239,716, including current assets $35,038 (cash on hand, $17,365, accounts receivable, $7,888, materials and supplies, $8,669, and prepayments of insurance and other, $1,116), properties—transportation road and equipment, less depreciation,

$196,938, and miscellaneous physical property, $7,740. Its expense and retained income statement for each of the calendar years, 1962 through 1966, and for February 1967, reveals, among other things, total railway operating expenses for February 1967, $14,774 and for 1966, $81,244, total income before fixed charges for February 1967, a minus ($725) and for 1966, $13,320 less miscellaneous rents paid, $1. Rent for leased road equipment for 1966, was $3,200 and for January 1967, $533. The balance of retained income for February 1967, was $7,504 and for 1966, $8,762. At the beginning of 1962, its retained income was $151,208, which by the end of February 1967, was reduced to $7,504, after adding annual income (less losses), and subtracting dividends of $167,356 paid during 1966.

* * * * * * *

SP&S operates over lines generally extending from Spokane through Pasco along the north side of the Columbia River to Vancouver, Wash., thence across the Columbia River through North Portland, thence across the east-west line of UP on the peninsula, and thence across the Willamette River, through Doane Lake Yard and Willbridge, Oreg., to Guild's Lake Yard. The latter connects with Portland Terminal Company tracks in downtown Portland. A connecting track at the intersection of SP&S and UP lines on the peninsula affords access to Barnes Yard. SP&S has trackage rights at Barnes Yard and at Terminal No. 4. UP and SP&S jointly own tracks extending from Barnes yard to the southwestern side of Rivergate which connect there with those of the Port of Portland. The SP&S Vancouver-Willbridge track, constructed in about 1908 with an industrial spur at North Portland, is jointly owned by SP&S and NP. In 1909 * * * [OWR&N] constructed a track connecting Albina with the spur track, and a year later

built a bypass track at the North Portland Junction. The bypass enables operation between Albina and North Portland interchange tracks without entering the SP&S-NP main line. * * * Additionally, SP&S owns Oregon Trunk Railroad extending from Wishram, Wash., a point on the SP&S line, to Bend, Oreg., and also owns Oregon Electric Railway Co., extending south from Portland to Eugene, Oreg. SP&S directly serves industries on its lines and those on lines used jointly by it located on the southwest side of the Willamette River at Portland including industries and docks also served by Portland Terminal Company. It serves industries at East Portland by use of the UP-SP steel bridge across the Willamette River near the Portland Terminal Company's depot and yard. SP&S switches cars to and from points in the East St. Johns and the Terminal No. 4 areas north of the Willamette River and south of Rivergate. SP&S delivers cars daily to the North Portland interchange tracks at 2:30 a.m. and 11 a.m. and picks up cars there at 9:30 a.m. and 6 p.m. UP also picks up and delivers cars there daily at 6:30 a.m. and 2:30 p.m. * * * North Portland line-haul traffic of NP and GN is usually moved twice daily to and from Vancouver. SP&S switches all Vancouver cars including those of UP. SP&S assesses a tariff switching charge for movement of cars to and from Peninsula interchange. * * * SP&S as owner of Peninsula could obtain Peninsula trackage rights which are essential to any agreement for switching operations. Presently Milwaukee could interchange cars with SP&S * * * for movement to the peninsula by payment of a division of the through rate. In the absence of Milwaukee trackage rights there the receiving carrier could designate car delivery points of Milwaukee cars. * * *

SP&S indicates that the extension of Peninsula to serve the Rivergate is uncertain because of heavy curvature, impaired clearances, and low standard tracks of Peninsula,

but alteration will become necessary with growth of the district; that a new direct access track from the SP&S main line at North Portland may be feasible; and that if such a track is constructed SP&S and UP have assured the Port of Portland they would provide service similar to that now available in the southwest part of the district. SP&S has made no decision respecting the planned additional access route to Rivergate. It expects to provide adequate switching service into the area as required.

* * * * * * * *

The SP&S parent companies' ownership is in issue in [the *Northern Lines* case] *** Pursuant to proposals therein, on October 26, 1966, Milwaukee entered into a written agreement with GN, NP, Chicago, Burlington & Quincy Railway, SP&S, and the New Company (The Great Northern Pacific & Burlington Line, Inc.), which as pertinent provides:

> Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, et al., the Milwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:
>
> ***Condition No. 2—Entry into Portland and Trackage Rights between Longview Junction and Portland.***

Provisions of the agreement relating to implementation of condition No. 2 require the New Company or of SP&S, where possible, to grant Milwaukee trackage rights over present NP and SP&S tracks between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of New Company facilities at Portland necessary for the switching of traffic to other railroads and industries. There is no specific reference therein to North Portland, or use of the North Portland interchange tracks.

* * * * * * * *

UP, a class I railroad corporation, operates over trackage extending (1) from Seattle to Portland, (2) from Portland, through O.T. Junction and Hinkle, Oreg., Pocatello, Idaho, and Cheyenne, Wyo., to Omaha, Nebr., (3) from Cheyenne, through Denver, Colo., to Kansas City, Mo., (4) from Spokane, Wash., to Hinkle, (5) from O. T. Junction, Oreg., to Bend, Oreg., and (6) from Pocatello to Los Angeles, Calif. UP connects at Bend with GN. *** UP tracks enter Portland from the east forming a great loop extending from a wye near Troutdale, 14 miles east of the Willamette River at Portland. One track extends from Troutdale generally west parallel with the Columbia River through Kenton Yard, Peninsula Junction, across the SP&S-NP tracks which enter Portland from the north, thence through Barnes Yard to the southwestern side of Rivergate and Terminal No. 4, and returns along the north side of the Willamette River through St. Johns Junction located in Swan Island Industrial Park, through Albina past the entrance of the steel bridge (which affords access to the Portland Terminal Company's yard and depot in downtown Portland) to East Portland (junction with SP), thence generally east through Sullivan Gulch to Troutdale. Track at the west end of the loop near Barnes Yard jointly owned by SP&S connects with Rivergate where UP has served Ash Grove Lime and Cement Company. An OWR&N *** track segment extends from North Portland interchange tracks, through St. Johns Junction, and Albina Yard to East Portland. This *** main track, was mentioned in connection with SP&S tracks. It crosses the western end of the UP loop as does the SP&S-NP tracks west thereof. This segment of track is of particular significance in these proceedings. SP traffic now moves or is expected to move over it. An issue respecting congestion of traffic on the track segment is raised by UP in its opposition to the SP proposals. The distance over the segment from

North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. From the connection of the North Portland interchange tracks with Peninsula over the OWR&N tracks to its intersection with the UP track at Peninsula Junction is about 2.04 miles. At this intersection connections permit switching in four directions. Operation over the turnouts there is limited to 15 miles per hour. Near this intersection UP also has a bypass track which will accommodate about 10 cars. The distance from Peninsula Junction over the segment south through a 1-mile tunnel to St. Johns Junction is about 2.16 miles and the distance beyond St. Johns Junction over the segment to the north end of Albina Yard is 1.02 miles. The track segment generally is level with the exception of the 5/10 of 1-percent grade increase from Albina Yard to the center of the tunnel. There is only one significant highway grade crossing on the segment at Columbia Boulevard which has a flashing light signal. There are also two or three private grade crossings near Peninsula Junction. Between Albina Yard and North Portland there is a 131-pound single-line track laid on rock ballast having no curves which create operating problems. Operation over the segment of track between Peninsula Junction and Albina Yard is presently controlled by a central traffic control system from Albina Yard. Albina Yard is a large and important classification and transfer yard of UP including about 44 tracks which will accommodate from 15 to 20 cars each extending about ¾ of a mile in length. The Williamette River lies along the western side of the yard and a super highway and a bluff lie along its eastern side limiting expansion. However, a map in evidence reveals that the yard at its center is about 500 yards wide and near its south end 666 yards wide. Most UP traffic to or from the Portland area moves through this yard. There is a 400 by 150-foot freight house at the south end of the yard. This is

used in part as a salvage depot by UP and in part by shipper lessees. All of the tracks are used for switching purposes by UP. It endeavors to keep open one or two of the center tracks in the yard to accommodate through traffic. None of the tracks are permanently designated as running tracks although a substantial amount of through traffic moves through the yard. UP operations at Albina Yard are represented as taxed to capacity, with no room for expansion there. Switch engines operate out of there to serve Kenton Yard, North Portland Barnes Yard, East Portland, Sullivan Gulch, and Portland Terminal Company. They move, in addition to freight, passenger trains to and from Portland Station. Two such trains operate each way daily through Sullivan Gulch. Other passenger trains moved by engines from Albina operate out of Portland Station over the SP&S main line through North Portland and not through Albina Yard. Five UP freight trains operate each way daily over the track segment between Albina Yard and North Portland Junction. Delays at North Point Junction interlocker are not uncommon with some delays as long as 80 minutes. SP uses the track between Brooklyn Yard and Albina Yard for freight moving to and from North Portland. The speed of traffic through the interlocker at East Portland is limited to 8 miles an hour. SP proposes to handle cars from Brooklyn to North Portland. UP represents that if the SP applications are granted congestion would occur principally on the single-track segment between St. Johns Junction and Peninsula Junction; that three-fourths of the UP trains arriving at Albina Yard via Kenton are delayed from 15 to 180 minutes because of Albina Yard congestion. Also, there is a 1.2-percent grade on the UP track 1 mile east of East Portland which tends to retard car movements. Usually engines stationed at Kenton Yard are used for switching

between Albina Yard and North Portland. There has been a consolidation of the Kenton Yard and Terminal No. 4 engines to eliminate congestion of traffic. There were about 40 to 56 switching [transfer and train] moves daily in the Peninsula Junction area during 1967. For example, an average of 40 *** [switch transfer or train moves] a day moved between October 1 through October 14, 1967, and an average of 37 *** [switch, transfer or train moves] a day between January 14 through 27, 1967. From January 26 through January 27, and from October 1 through October 14, 1967, traffic clearances in excess of 30 minutes between Albina Yard and North Portland interchange occurred from about 4 to 11 times or an average of 7.5 times daily. There are four transfer SP trains handled daily at Albina Yard. About 6 UP trains move each way in addition to trains of NP, GN, and SP&S over tracks north of North Portland or a total of about 55 trains daily use those tracks. About 30 minutes time should be required to operate a switch engine with a few cars over the cleared track segment between North Portland and Albina Yard. However, an average of about 30 hours has been required for the movement of SP cars and also those of UP between Albina Yard and North Portland. UP does not consider a 30-hour transit time adequate service and has endeavored to reduce the running time by the described consolidation of its Kenton-Terminal No. 4 terminal service, by the establishment of the above-described central traffic control, by breaking trains at Seattle, Dow, Hinkle, and Pocatello to avoid switching at Albina Yard, and by increased operation through Sullivan Gulch.

There is a double track extending from the south end of Albina Yard to East Portland and the junction of the SP there. Even though traffic congestion exists at Albina Yard,

UP nevertheless represents that it can provide Rivergate any service through Peninsula needed and represents that its present service in the involved area meets shippers' demands for service. The steel bridge crossing the Willamette River at East Portland is jointly owned by SP and UP. The bridge, as noted, allows UP and SP to connect with the tracks of the Portland Terminal Company, the Portland Yard, the SP&S Hoyt Street Yard, and the SP&S and NP Guild's Lake Yard, which permits SP to interchange traffic at the latter yard with SP&S or NP. Portland Terminal Company is a terminal switching company owned 40 percent by UP, 40 percent by NP, and 20 percent by SP.

UP, as noted, physically connects with Peninsula at North Portland, an interchange junction point and station on GN, NP, SP&S, and UP, within the Portland switching district. The physical interchange of line-haul traffic moving by UP or its connections is performed by UP. On traffic moving to and from SP via SP&S, NP, GN, and UP from and to industries located on Peninsula, SP absorbs the Peninsula's rate division, and on traffic in which Milwaukee participates through joint routings, no switching charges are passed on to the shipper or consignee. UP expects to continue its policy of permitting line-haul carriers having no physical interchange with Peninsula to reach, through existing joint rates and routes, industries on the latter's line.

At the request of the Port and the Commissioner of Public Docks, a railroad conference was held at Portland on June 20, 1967, to consider elimination of noncompetitive switching charges to or from industries located on the Port's property at Swan Island (Albina) and Rivergate to encourage industrial development there. Thereafter, railroads participating in the conference agreed to establish

a single basis of switching charges at all common points within Northern Idaho, Washington, and Oregon, with switching charges to be absorbed by the line-haul carriers where the line-haul minimum revenue is $100 a car after absorption, and no absorption of switching charges when specific tariff rate items are excluded. UP represents that when the agreement is implemented all industries within the Portland switching district including the Port's property area served by Peninsula, and points in North Pacific Coast territory will be on a competitive relationship except for the two conditions noted.

* * * * * * * * *

SP, a class I railroad, operates over trackage generally extending (1) from Portland south through Eugene and Klamath Falls, Oreg., Sacramento, San Francisco, and Los Angeles, Calif., Phoenix and Tucson, Ariz., El Paso and Houston, Tex., to New Orleans, La., (2) from San Francisco through Sacramento, Calif., Reno, Fernley, Weso, and Alazon, Nev., to Ogden, Utah, and (3) from Fernley to Klamath Falls. Service over these tracks is rendered by SP at many points south and east of Portland in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. At Portland, the northern terminus of SP tracks, as noted, connects with those of UP at an interlocking plant about 375 feet south of the eastern end of the UP-SP steel bridge across the Willamette River at Portland. SP maintains a large switching yard at Brooklyn known as the Brooklyn Yard about 2.6 miles south of the interlocker. Trains moving into Portland from the south over SP lines are generally sorted and blocked at Eugene, Oreg., about 125 miles south of Portland and move to Brooklyn Yard for further blocking if required before they are received by UP at East Portland. SP traffic to or from Peninsula moves principally over UP tracks from East

Portland through Albina Yard, St. Johns Junction to the North Portland interchange tracks. In some instances SP traffic also moves from East Portland across the steel bridge to the Portland Terminal Company yard, thence to Hoyt Street Yard for interchange with SP&S and movement over the SP&S main-line tracks to North Portland interchange. The distance from Brooklyn over the UP tracks to Peninsula is about 8.59 miles. An SP engine and crew is used to move cars from Brooklyn through East Portland, thence over the UP tracks to Albina Yard where they are received by UP for movement to Peninsula. The switch engine and crew of SP performs service from North Portland to Albina Yard as UP's agent. Similarly an SP switch engine and crew moves cars from Brooklyn over the alternate SP&S route to North Portland by operating as far as the Portland Terminal Company's yard where they are received by Portland Terminal Company, as an agent for the latter company. SP represents that if it is granted bridge trackage from the interlocker at East Portland to Peninsula at North Portland interchange tracks its engines and crews can operate from Brooklyn to North Portland. About 2 hours switching time would be required for a SP engine and crew to operate between Brooklyn and Albina Yard and an additional 1.5 hours between North Portland and Albina Yard or a total of about 3 hours and 30 minutes.

There are delays in the movement of traffic over the UP tracks between those points. A 10-percent random sample consisting of 42 cars (from a total of 410 cars) of SP traffic switched to and from Peninsula during 1967 in evidence reveals, among other things, an average of 32 hours and 10 minutes required for car movements from the SP interchange points to Peninsula when switched by UP or SP&S and an average of 55 hours and 16 minutes when

moved from Peninsula to the SP interchange point. SP represents that 30 hours or more required for the movement of cars between Albina and North Portland interchange is excessive and that SP with bridge rights can provide faster service. From 25 to 57 trains, or an average of 40, move over the UP tracks between Albina Yard and North Portland each 24 hours. SP anticipates no operating difficulties or labor complication in connection with its proposed operation over the described UP North Portland-Brooklyn Yard tracks. During 1967 about 490 cars were moved between Brooklyn Yard and North Portland interchange tracks over the described routes. It further represents that the proposed operation of unit trains of iron ore over the described UP tracks to and from Peninsula is feasible.

* * * * * * *

Milwaukee, a class I railroad, operates over main lines from Seymour, Ind., through Chicago, Ill., Minneapolis, Minn., Seattle and Tacoma, Wash., to Longview, Wash., a point on the Columbia River about 46 miles from Portland. Its main lines also extend from Chicago to Council Bluffs, Iowa, and to Kansas City, Mo. It serves the grain producing areas in Montana and eastern Washington and provides a connecting carrier service from those points to Portland. It also serves much of the forest products producing area in Idaho and Washington and industries in Tacoma, Seattle, Everett, and Bellingham, Wash., north of Portland. Also, service is rendered at the industrial cities, among others, of Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, Davenport, Rock Island, Moline, and Bettendorf. At the time of hearing it performed no physical operations to and from the Portland area and was awaiting final disposition and consummation in * * * [of the *Northern Lines* case]. If the Milwaukee petition herein for inclusion is authorized it expects to operate fast trains between Chicago,

Seattle, and Portland and between Portland and Sumas, Wash., with connection at the latter point with British Columbia railroads. However, such service cannot be established if terminal delays occur at Portland which offset the proposed service advantages. Its proposed service at Portland includes physical operation of its equipment to and from the Peninsula interchange tracks at North Portland. All the industries on Peninsula would be served as on-line industries with no absorption of switching charges. Despite postponement of the effective date of consummation in the *Northern Lines* merger case pending consideration of various petitions, Milwaukee expects the merger will be confirmed and consummated within a reasonable time, and contingent upon its extension of operations to Portland, requests joint and equal ownership of Peninsula stock with other trunklines and proposes to assume its share of the portion of the stock and indebtedness as set forth in the application. Its joint ownership is considered essential to its Portland operation to industries located on Peninsula and at Rivergate. Peninsula is the only terminal facility at Portland not owned by trunklines presently serving that point.

Milwaukee has a centralized, computerized expedited service for tracing, reconsignment, and diversion of cars and for the elimination of car delays. It owns 39,000 freight cars and in 1967 it transported 61,140 trailers in its trailer-on-flatcar (TOFC) service. It maintains facilities at various points for the loading and unloading of this type of traffic. Since 1963 it has maintained a 55.5-hour schedule service from Chicago to Seattle and 67.25-hour return. * * *

Milwaukee is not owned or controlled by any other railroad and does not own or control any other parties to the instant proceedings directly or indirectly. Its officials and directors have no common interest in such parties to this

proceeding. Milwaukee does own an interest in a number of other transportation companies not particularly pertinent to these proceedings.

INTERVENERS' EVIDENCE

The Port's position is that Rivergate's development requires services of all the involved line-haul rail, barge, and ocean vessel carriers serving Portland with service at competitive rates, and that all the rail applicants should be afforded equal operating access to Rivergate. It expresses a need for fast reliable freight service at Rivergate through Peninsula provided on equal terms by all present and future railroads serving Portland which can be accomplished by joint ownership. The Port desires the services of all the railroads to facilitate to mechanized rapid handling of liquid and dry bulk commodities, containerized commodities, and other general freight between Rivergate and points throughout the United States. It asserts that singlecar switching to and from small industries with so-called one-car sidings has become obsolete. Such switching is uneconomical because of engine and crew costs, and obsolete because trucks can more effectively perform a small shipment service.

The western district class I railroads traffic increased 36.2 percent in the 9 years following 1958. The Port's transportation consultant estimates that by 1990 traffic of those railroads will double, if adequate rail facilities are provided, and that Portland would share in its growth. Adequate facilities would include the most efficient mechanically fitted freight handling terminal with low freight handling costs possible through greater movement of intermodal traffic. After Rivergate's development, the Port estimates that from 500 to 600 cars or an average of 20,000 tons daily will move to and from the district; that daily service will

require 1 unit train, 1 semiunit train, 1 semiunit TOFC train, 2 industry trains, and 2 switching runs, and that the types of service would include provision for (1) bulk commodity unit trains (never uncoupled), (2) semiunit-train service for handling the less mechanized traffic to move in blocks of 40 to 150 cars, (3) TOFC service, and (4) miscellaneous and switching service. Rivergate is represented as affording opportunity for use of new technology in rail terminal service by use of unit and semiunit trains, and the elimination of lost car movement time usually incurred at terminals. UP and SP&S, as noted, are the only carriers presently having direct access to Rivergate through the eastern and western entrances. The Port indicates that unless the four applicant railroads are afforded equal access to Peninsula its owners would create unsatisfactory non-single-line switching conditions for the other lines; that unit-train bulk traffic is impeded equally as much by switching delays as by traffic interchanges; that if Milwaukee traffic is switched by SP&S or UP before reaching Peninsula, Milwaukee's single-line efficiency to and from points in such States as Indiana and Iowa will be impaired; that if SP traffic is similarly switched, its single-line advantage to and from such points as Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans, and Memphis will be limited. The Port represents that existing uncorrelated transfer of freight cars within the Portland switching district will not meet Rivergate's rail service needs; that uncoordinated switching operations at Portland result in a minimum 24-hour transfer time, and sometimes 3 or 4 days for operations across the switching district compared to a few hours required for cross-city truck movements. Peninsula assertedly will be useful to Rivergate only if it can handle unit trains of 100 cars or more which Peninsula's track facilities presently will not accommodate.

Economic and statistical evidence relating to Rivergate presented by the Port's Research and Planning Department reveals, among other things, the following: The Columbia-Willamette system is the second largest river improvement project in the United States. The Federal Government and the Port together, up to December 31, 1967, expended $120 million in improving the system. Ultimate public and private investment at Rivergate is expected to exceed $500 million. The Research and Planning Department is responsible for obtaining the described D.M.-J.M. commercial engineering Rivergate survey, report, and recommendations. The Port's long experience in marketing and research and its recognization of current technological transportation changes influenced its support of joint ownership of Peninsula by all the line-haul railroads serving Portland. The value of waterborne imports and exports in the Portland Custom District increased 313 percent from 1954 to 1966, compared to increases during that time of 201 percent at Los Angeles, 128 percent at San Francisco, and 132 percent at Washington ports. The Portland oceanborne traffic increased from 8,535,686 short tons in 1955 to 10,489,989 tons in 1965, or 22.9 percent.

The Portland Commission of Public Docks, City of Portland, favors joint ownership and operation of Peninsula and direct access to Rivergate by all line-haul railroads serving Portland. It is particularly interested in the transportation cost to shippers for movements to and from Rivergate, and asserts that noncompetitive transportation costs there would preclude consideration by industries of Rivergate as an industrial site. The Commission represents that establishment of a $100 per car line-haul revenue minimum as proposed in the Conference of Railroad Presidents June 20, 1967, agreement to establish a single-basis switching charge at competing Pacific Northwest points would

adversely affect Rivergate shippers' interest without equal ownership by all the line-haul railroads in Peninsula. Railroads with no such interest for economic reasons would be required to assess switching charges, while owner-carriers subject to their own tariff provisions could absorb switching costs on the basis of a lower applicable car minimum revenue. Numerous illustrations of instances in which this might occur are in evidence. For example, a nonowner carrier subject to the P.C.F.B. tariff No. 35, I.C.C. 1098, item 685, naming a rate on cans, fibreboard, set up, of 40.5 cents a hundredweight, 14,000-pound minimum weight, from Portland to Banks, Oreg., representing a minimum-car revenue of $84.70 would be required to assess an additional charge while an owner-carrier would absorb such a charge. Also, pointed out is the second exception to the proposed switching agreement which provides that switching charges will not be absorbed in instances where excluded by specific tariff provision.

The Public Utility Commissioner of Oregon, favors joint ownership of Peninsula by all line-haul carriers serving Portland. Evidence presented by the Commissioner covers geographical and physical characteristics of the involved transportation area. It reveals, among other things, that in addition to the five major railroads, NP, GN, SP&S, UP, and SP presently serving the Portland area, 275 motor carriers operate to, from, or within Portland. Fifty-one of these carriers are regular-route general-commodity carriers all authorized to serve Rivergate within the Portland commercial zone. Tables in evidence presented by the Commissioner show that the annual operating revenue of Peninsula has ranged from a high of $161,292 in 1956 to a low of $75,949 in 1963. Its average revenue per car for switching

service increased from $7.93 in 1950 to $27.71 in 1966. Peninsula's net operating income has ranged from $39,253 in 1955 to a deficit of $4,153 in 1962. While it operated at a deficit in 1962 and 1963, its income has since considerably improved. The commissioner represents that the future need of Peninsula is closely related to development of Rivergate and the granting to SP and Milwaukee of direct access to Peninsula would provide present and future industries served by Peninsula direct service by all line-haul railroads serving Portland.

Through rates and charges of SP&S, GN, NP, and UP are presently applicable to industries served by Peninsula. SP does not interchange traffic at Peninsula and depends upon SP&S or UP switching service between the SP interchange at Portland (Union Station) or East Portland and the North Portland interchange. SP presently absorbs the switching charges on traffic moved to or from Peninsula subject to a per-car minimum charge of $67 plus increases. Peninsula industries pay UP or SP&S for switching between North Portland and East Portland when the published through rates do not provide for absorption of the switching charges. For example, a switching charge is applicable to noncompetitive traffic originated by SP in Oregon moving to Peninsula.

* * * * * * * * *

Zellerbach, the second largest producer of paper and paper articles in the United States and also a producer of industrial chemicals, has its principal manufacturing and shipping facilities located in the Portland area. It also has paper mills at Camas, Wash., and Wauna and West Lind, Oreg. It ships in excess of 1,100 carloads of the described commodities each month from the Portland area to

various points throughout the United States. Zellerbach has or expects to establish four facilities in the Portland area. One is a distribution complex, Water Way Terminal Company, served by the Portland Terminal Company and Western Transportation. The latter is a certified water carrier owned by Zellerbach which has connections with a number of other carriers. At the time of hearing, Water Way Terminal Company facilities were being expanded and Zellerbach was negotiating for the purchase of a 1,500-waterfront property located adjacent to Ashgrove Lime Company at the western end of Rivergate. The second is a pole yard located on 40 acres of land owned by Zellerbach at the eastern end of Rivergate. The pole yard, as noted, is served by Peninsula. The third facility is the planned construction of a 200,000-square foot warehouse to be located on 44 acres of land purchased from Swift & Co. At the time of hearing the land purchase was waiting escrow clearance. The land is about 500 yards east of the SP&S main line at North Portland. The warehouse is expected to be used for the storing and distribution of products of the adjacent Zellerbach Flexible Packaging Division plant, the fourth facility.

During the 12 months ending November 30, 1967, 365 freight cars moved to or from the Flexible Packaging Division plant and 638 freight cars (177 shipments) to and from the pole yard. The shipper's poles now move in 65-foot drop-end gondola cars supplied by the rail carriers. Sixty-four percent of the 177 pole shipments involved delays due to Zellerbach's inability to obtain suitable cars when needed. The delays ranged from 1 to 26 days, or an average of 4.5 days each.

Zellerbach supports each of the applications and petitions because authorization of the proposals would increase the number of carriers having direct access to Peninsula and increase its ability to obtain suitable cars, and because it desires service at its Rivergate facilities comparable to other transportation at Portland. It represents that such access could result in the elimination of a 22-degree curve in the present Peninsula tracks so that 85-foot pole cars can be accommodated thereon. Zellerbach represents that if SP had direct access to its pole yard, it would request that carrier's service more often. The Zellerbach representative could recall no instances in which it paid separate switching charges for service to and from its facilities located on Peninsula. Zellerbach indicates that the greater the number of connecting carriers required for handling a shipment the greater the number of rate divisions and cost of service.

Oregon Steel Mills, a division of Gilmore Steel Corporation of San Francisco, within the past 2 years has acquired 152 acres of Rivergate land where it is presently erecting a new steel plate mill. Several phases of construction of the mill are contemplated. The first phase cost is $35 million. Upon completion of the first phase mill, it will produce 200,000 tons of steel plate annually and upon completion of the entire mill the ultimate mill's capacity will be 700,000 tons. The mill site was located at Rivergate because it affords room for the mill's expansion and for the location of related steel fabricating industries near it and because Rivergate is considered by this shipper as a transportation hub. There are presently steel plate mills located at Provo, Utah, and Fontana, Calif. The Rivergate mill will be the first producing steel plate mill located in the Pacific North-

west and its location will result in the establishment of a steel basing point at Portland, whereas up to this time the steel basing points have been at Provo and Fontana. Ore for use at the mill presently will be provided by Marconi Company transported by water carrier from Peru to Rivergate. However, Gilmore Steel Corporation owns large iron ore deposits near Mount Shasta, Calif., near a line of the SP. Arrangements are in progress for procuring iron ore at the Shasta location. Oregon Steel Mills expects to ship unit trains of ore from Shasta to the Rivergate mill and has obtained assistance and information respecting proposed transportation costs from SP, which in turn procured proposed costs of switching at Portland from UP. SP, prior to the filing of its applications, proposed to transport the shipper's ore from Shasta to the UP Portland interchange in SP equipment, including all terminal service charges at Shasta at $3.85 a gross ton subject to a tariff docketing proposal, and information received from SP respecting the proposed UP switching costs which was confirmed through the UP rate department was $0.23 a gross ton from the UP-SP interchange at Portland to Rivergate. Oregon Steel Mills prefers a single traincrew and through round trip unit-train service. UP indicates it cannot provide this type of service at Portland because union contracts require the use of local power equipment and the payment of the Portland crew for a minimum worktime. The shipper represents that it would start mining ore at Shasta as soon as economically feasible, that its ore can move economically only in unit trains in the service of a single carrier with no connections and that it supports the SP applications to enable direct access to its Rivergate plant by SP through North Portland. The shipper is aware that major fill and track construction would be necessary before operation from Shasta through

North Portland becomes possible. It indicates that Rivergate is being developed by use of public tax money and it believes direct access to Rivergate should be afforded through all rail carriers.

Collier Carbon & Chemical Corporation, a Union Oil Company subsidiary, is constructing a new $2 million distribution facility north of the Ashrover Lime Company plant on the western side of Rivergate. The plant, to be in operation by the Fall of 1968, expects to use the direct service of SP, among other rail carriers, for the movement of its products from Rivergate. Urea, used in the manufacture of resins and fertilizer and as a cattle feed ingredient, is to be shipped by water carriers to the facility and to be reshipped by rail, truck, and water carriers to its customers. It is particularly interested in obtaining SP service for movements to western Oregon points and supports the SP applications because direct SP service would provide it suitable transportation to western Oregon points within provision of reasonable transit time, car availability, and rates. It has no preference as to the carrier switching its traffic to a belt-line or terminal company.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of June 1969.

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF TERMINAL FACILITIES—PENINSULA TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF CERTAIN TERMINAL FACILITIES—UNION PACIFIC RAILROAD CO.

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, in Finance Docket No. 24679, subject to the conditions referred to in said report, acquisition by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company of control of the Peninsula Terminal Company through the purchase of its capital stock, as described in said report and under the terms and conditions found therein to be just and reasonable, be, and it is hereby, approved and authorized;

It is further ordered, That the petitions of the Southern Pacific Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company for inclusion in the transaction approved and authorized above in Finance Docket No. 24679, as described in said report, be, and they are hereby, denied;

It is further ordered, That in Finance Dockets Nos. 24890 and 24891, the applications of the Southern Pacific Company for common use of the facilities of the Peninsula Terminal Company and of certain trackage of the Union Pacific Railroad Company as described in said report, be, and they are hereby, denied; and

It is further ordered, That this order shall take effect and be in force from and after 35 days from the date of its service; that if the authority granted in Finance Docket No. 24679 is not exercised within 180 days from said effective date, this order shall be of no further force or effect; and that if the authority granted in Finance Docket No. 24679 is consummated, the applicants therein shall confirm in writing to this Commission, immediately thereafter, the date on which consummation has actually taken place.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

Appendix C

SERVICE DATE
OCTOBER 31, 1969

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of October, 1969.

Finance Docket No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Upon consideration of the record in the above-entitled proceeding, of the petitions of Southern Pacific Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Port of Portland, The Public Utility Commissioner of Oregon and of Crown Zellerbach Corporation, for reconsideration of the report, 334 I.C.C. 419, and order of the Commission, Division 3, dated June 6, 1969, including various requests for further hearing and oral argument, and of joint reply thereto by applicants; and

It appearing, That the material matters set forth in the petitions have been considered by the Division and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, and that no showing has been made warranting reconsideration, further hearing or oral argument:

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1. This proceeding also embraces Finance Docket No. 24890, Southern Pacific Co. Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co. —Common Use of Terminal Facilities—Union Pacific Railroad Co.

It is ordered, That said petitions be, and they are hereby, denied, and that the order of the Division dated June 6, 1969, be, and it is hereby, made effective 20 days from the date of service of this order.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

Appendix D

SERVICE DATE
NOVEMBER 26, 1969

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of November, 1969.

Finance Docket No. 24679

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Finance Docket No. 24890

SOUTHERN PACIFIC CO.—COMMON USE OF TERMINAL FACILITIES—PENINSULA TERMINAL CO.

Finance Docket No. 24891

SOUTHERN PACIFIC CO.—COMMON USE OF CERTAIN TERMINAL FACILITIES—UNION PACIFIC CO.

Upon consideration of the record in the above-entitled proceedings, including the petitions of Southern Pacific Company, Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, Public Utility Commission of Oregon, The Port of Portland, and Crown Zellerbach Corporation, filed November 12, November 13, November 17, November 12, and November 17, 1969, respectively, under the provisions of section 1.101(a)(a)(4) of the General Rules of Practice before the Commission for a finding that an issue of general transportation importance is involved; and

It appearing, That no issue of general transportation importance is involved in these proceedings:

It is ordered, That the said petitions be, and they are hereby, denied; and

It is further ordered, That the order of June 6, 1969, by Division 3, shall be effective 20 days from the date this order is served.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

Appendix E

INTERSTATE COMMERCE COMMISSION

Served September 24, 1968

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

Finance Docket No. 24679[1]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY—CONTROL—PENINSULA TERMINAL COMPANY

Decided.....

In Finance Docket No. 24679 and related petitions, control by Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and the inclusion therein of Southern Pacific Company, through pur-

1. This report also embraces Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Terminal Co., and Finance Docket No. 24891, Southern Pacific Co.—Common Use of Certain Terminal Facilities—Union Pacific Co.

chase of all outstanding stock of Peninsula Terminal Company, and sale of an equal interest therein, subject to conditions subsequent, to Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and authorization of trackage use for access to Peninsula Terminal Company, found to be consistent with the public interest, and application and petitions in all other respects denied. Conditions prescribed.

In Finance Docket Nos. 24890 and 24891, common use by Southern Pacific Company of the terminal facilities, including trackage of Union Pacific Railroad Company between Peninsula Terminal Company and the Southern Pacific Company-Union Pacific Railroad Company connection at East Portland, Oreg., found to be in the public interest and to be practicable, without substantially impairing the ability of Union Pacific Railroad Company to handle its own business, and applications in all other respects denied. Conditions prescribed.

Hugh L. Biggs, James Warren Cook, Richard Devers, Randall B. Kester, F. J. Melia, R. Paul Tjossem, and *John F. Weisser* for applicants in Finance Docket No. 24679.

Charles W. Burkett, W. Harney Wilson, and *Oglesby W. Young* for applicants in Finance Docket No. 24890 and No. 24891, and petitioner in Finance Docket No. 24679.

Raymond K. Merrill, Warren H. Ploeger, Thomas H. Ploss, and *E. O. Schiewe* for petitioner in Docket No. 24679.

Lloyd A. Combs, William M. Dunegan, John L. Green, Richard H. Kraushaar, Robert K. Little, Hollis Menow, Harold A. Ross, Edgar E. Smith, Homra C. Watson, and *Milton A. White* for protestants in each proceeding.

Dale T. Crabtree, Samuel P. Delisi, Milton A. Mowat, Richard W. Sabin, Robert W. Skirvin, Lofton L. Tatum, Robert Y. Thornton, and *Henry M. Wick, Jr.* for intervenors in each proceeding.

REPORT AND RECOMMENDED ORDER BY SAMUEL C. SHOUP, HEARING EXAMINER

In Finance Docket No. 24679, by joint application filed July 25, 1967, Spokane, Portland & Seattle Railway Company (SP&S) and Union Pacific Railroad Company (UP), pursuant to section 5(2) of the Interstate Commerce Act, seek authority to acquire control of the Peninsula Terminal Company (Peninsula) through purchase in equal shares of all of Peninsula's capital stock.

By petition filed August 23, 1967, Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) seeks inclusion in the proposed transaction in Finance Docket No. 24679 and if consummated authorized (1) to purchase one-third of the outstanding capital stock of Peninsula (2) to pay one-third of the contribution to capital of $70,000 to cover the purchase of two diesel locomotives, and (3) to acquire rights over track jointly owned by UP and SP&S from the main-line of SP&S to Peninsula's lines upon reasonable terms and conditions as negotiated by the parties, or as found just and reasonable by the Commission. Separate replies to the petition were filed December 29, 1967, by UP and SP&S. UP contends generally (1) that Milwaukee is not a railroad in the territory as used in section 5(2) of the act because it does not serve the Portland terminal area, (2) that if Milwaukee is granted trackage rights between Longview Junction and Portland as a condition or to approval of the Northern Lines merger, in Finance Docket No. 21478, *Great Northern Pac.-Merger-*

Great Northern, 331 I.C.C. 869, nevertheless it would be unable to serve the Portland Terminal area unless there is a separate application and Commission's approval of operations under such trackage rights, (3) that if Milwaukee operates to and from the Portland Terminal area, it would not connect with Peninsula because the segment of track between Peninsula and the Northern Pacific Railway Company (NP)-SP&S main line is jointly owned in whole or in part by UP, NP, SP&S, and Peninsula, and joint use of such trackage cannot be granted in these proceedings, and (4) that joint stock control as requested is not in the public interest and would lead to cumbersome, confused, and divided management. SP&S in its reply generally alleges that inclusion of Milwaukee as a joint stock owner of Peninsula is not in the public interest and that joint use of trackage at North Portland to reach tracks of Peninsula is not in the public interest because of joint carrier use of the interchange tracks there.

By amended petition filed November 29, 1967, Southern Pacific Company (SP) requests as a condition to approval of the application in Finance Docket No. 24679, (1) that SP be included as an equal joint owner of Peninsula, and (2) that SP be granted bridge trackage rights over UP's main line, and terminal trackage between Peninsula and the SP-UP track connection at East Portland, Oreg., as a condition to participation in joint ownership of Peninsula under section 5(2)(d) of the Act, and in event either or both of the applicants decline to participate in the acquisition subject to such condition an order be entered pursuant to section 3(5) of the Act authorizing SP to use the said UP trackage. UP and SP&S by joint reply thereto, filed December 13, 1967, (1) contend that to grant petitioner's request would unduly broaden the issues, and (2) indicate

that such a request should be made in a separate proceeding pursuant to section 3(5) of the act.

In Finance Docket Nos. 24890 and 24891, by separate applications each filed December 19, 1967, Southern Pacific Company, pursuant to section 3(5) of the act, seeks, in Finance Docket No. 24890, (1) common use of the terminal facilities of Peninsula and (2) bridge trackage rights over UP between Peninsula and the SP-UP connection at East Portland, Oreg., and in Finance Docket No. 24891, common use of the terminal facilities of UP between Peninsula and the SP-UP connection at East Portland, Oreg. These applications were filed, in addition to the above described SP petition, to assure relief both under section 5(2)(d) and section 3(5) of the Act because of the permissive nature of conditional grants by the Commission under section 5(2) which the parties, in their discretion, may elect to exercise. *Houston Belt & Term. Ry. Co. Control,* 275 I.C.C. 289, 312.

The applications, and the petitions and replies thereto were referred to the examiner for hearing on a consolidated record and the recommendation of an appropriate order thereon. Hearing was held at Portland, Oreg., on February 26 through 29 and March 1, 1967. Eight railway employee organizations[2] oppose each of the applications. The Port of Portland Commission, the Public Utilities Commissioner of Oregon, and Crown Zellerbach Corporation intervened in

2. Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Engineers Division representing employees of SP&S; Brotherhood of Locomotive Engineers (Union Pacific Railroad Northwest District, Oregon Division); Brotherhood of Railway Clerks representing employees of Portland Terminal Railroad; Brotherhood of Locomotive Engineers of Portland Terminal Railroad Company; Southern Pacific Railroad Yardmasters of North America, Inc.; Railroad Yardmasters of North America, Inc.; Portland Terminal Railroad Co.; and Switchmens' Union of North America.

each of the proceedings in support of positions hereinafter described. UP and SP&S oppose the SP applications in Finance Docket Nos. 24890 and 24891 and request that the petitions of Milwaukee and SP be denied. The parties hereto are hereinafter referred to by appropriate short titles. Briefs were filed separately by each of the applicants and petitioners in the proceedings, and by The Port of Portland Commission (The Port) and the Public Utility Commissioner of Oregon and Brotherhood of Locomotive Engineers.

Peninsula is a terminal railroad Oregon corporation subject to Part I of the Interstate Commerce Act engaged in switching operations at North Portland, Oreg. North Portland is within the Portland switching district. Portland is a major deep channel seaport, transportation, and distribution center serving the Pacific Northwest and the Continental United States. The western end of Peninsula's main line extends to a Crown Zellerbach pole yard (See Map, Appendix A) at the eastern tip of Rivergate Industrial District (Rivergate), hereinafter described, affording potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings. Peninsula owns no tracks within Rivergate. It serves the pole yard by using industrial tracks of Zellerbach there. Peninsula was established as an essential for operation of Portland Union Stockyards (Portland Stockyards) to facilitate handling livestock, and to provide a rail connection between the stockyards and trunk-line railroads serving the Portland area. The Commission in Docket Number 8389 on October 18, 1930, authorized Peninsula to operate as a terminal switching railroad. Sometime prior to 1936, Swift & Company acquired interests in various stockyards and terminal rail facilities, in-

cluding the Portland Stockyards and Peninsula which the former owned. Pursuant to a consent decree obtained by the U.S. Attorney General in a U.S. Court injunction proceeding brought under the Sherman Act and the Clayton Act, Swift divested itself of stock interest in certain stockyards and terminal carriers. One of the properties, Portland Stockyards, was sold to United Stockyards Corporation (United), presently a division of the latter. Since January 1, 1968, Portland Stockyards has been leased to and operated by Portland Livestock Market, Inc. (Portland Livestock). Control of Peninsula, through stock ownership by United, was authorized by the Commission, Division 4, on March 9, 1943, in *Stockyards Ry. Co. Control,* 254 I.C.C. 207. United's interest in railroad operations extends only to those necessary for its stockyards' operation. Since it acquired Portland Stockyards, operations there have materially changed. Whereas, it was used to supply cattle for Swift's meat packing operations, it presently is an auction yard. Swift & Company presently processes only agricultural chemicals, hides, and wool at North Portland and the volume of that activity is expected to decline. Crown Zellerbach Corporation (Zellerbach) recently acquired the North Portland Swift property and expects to establish a 200,000 square foot warehouse and an ink manufacturing factory there. Zellerbach also has its Flexible Packaging Division plant at North Portland and operates the above-described pole yard at the west end of the Peninsula line in the Rivergate area. Peninsula serves thirteen industries on its line other than the stockyard. As a result of the changes, Peninsula has become less important to Portland Stockyards and United has no interest in operating a railroad independent of stockyard operations. It therefore proposes to sell all of the stock in Peninsula at a reasonable price established

through a 1962 appraisal by American Appraisal Company and has no preference as to the purchaser. The Commission is represented as having accepted the valuation of the properties of Peninsula based upon historical book cost. The agreed purchase price of Peninsula under a contract of purchase dated February 28, 1967, between United and SP&S and UP is a total of $299,405 for all outstanding shares of common stock of Peninsula plus a sum of $70,000 to reimburse United for two switch engines sold by United to Peninsula representing an unsecured account payable to United. Settlement to be made by checks of purchasers upon approval of the transaction. The appraisal was based on empty land, plus local costs of roadway and structures, less depreciation. Adjustment of the appraisal, at the time of contract of sale was made only as to rolling stock, working capital, and miscellaneous betterments. The President of Peninsula represents that the contract price is fair and reasonable.

Peninsula properties consist of 13.17 acres of land, none suitable for industrial development, 15,559 feet of main line track plus spurs and sidings or a total of 3.79 miles of main line and secondary and spur track laid on treated ties in sand with no rock ballast. The distance from one end of the line to the other is about 8,000 feet with a 5-foot elevation to its eastern end. The above-noted two locomotives owned by Peninsula consist of a 50-ton G. E. electric, and the other, a 70-ton Copper Bessimer electric, including tools and parts for operation and maintenance. Tools for track maintenance, a conveyance for workmen, a heated engine house for both locomotives, a yard office (14 feet by 23 feet 6 inches in size), and a sand house (11 feet by 18 feet in size) are also owned.

Officials of Peninsula are T. E. Rockford, President (also an employee of United), R. W. Hunt, Vice-President, C. N. Curtis, Secretary-Treasurer. All except Hunt are stationed in North Portland where they handle accounts, labor, claims, demurrage, and interchange, and clerical work of the carrier. They are all United-Peninsula joint employees. United pays them and bills Peninsula for a portion of their services. Insurance matters of Peninsula are handled by United in Chicago where Hunt is stationed.

Peninsula receives cars directly from and delivers cars to SP&S, NP, UP, and Great Northern Railway Company (GN) (empty and loaded) at North Portland, which total about 30 cars daily handled through the North Portland Freight Station with an office located at the Portland Stockyards. The cars move to or from double main-line tracks jointly owned by SP&S and NP, extending from Vancouver, Washington, south across the Columbia River, through North Portland and across the peninsula at the junction of the Columbia and Willamette Rivers (the peninsula) to SP&S Doan Street Yard and the Portland Terminal Company's Guild's Lake Yard. At North Portland there is, among other things, a head block on the SP&S-UP tracks and a 259.5-foot track extending therefrom to four North Portland interchange tracks 2,400 feet in length which accommodate from 30 to 35 cars each. One, is used by Peninsula for receipt of cars from the trunk lines. The second is used by Union Pacific to receive cars from Peninsula, GN, NP, and SP&S. The third is used by SP&S, NP, and GN to receive cars from Peninsula and UP, and the fourth is an open or running track. Two of the interchange tracks are owned, one-half by Peninsula, and one-half jointly by UP, SP&S, and NP. The other two tracks are owned jointly by UP, SP&S, and NP. The interchange tracks connect directly

with Peninsula's main line track to the north and also with a single-line track of OWR&N (a UP subsidiary) extending about 1.7 miles southerly across tracks of UP to Peninsula Junction, and thence about 2.6 miles through a tunnel near St. Johns Junction to Albina Yard. The interchange tracks are used by Peninsula, UP, NP, and SP&S as joint owners, and by GN under a contractual arrangement. The use includes interchanges between the four trunk lines and also between those lines and Peninsula. Actually about 8,100 cars are interchanged there of which 39 percent represents Peninsula interline business. All the cars are either billed from or consigned to industries in the Portland area. Service at North Portland is provided through a joint local freight agent of the trunk lines who informs Peninsula of industry service requested as to outbound moves. The agent prepares the inbound interchange reports and Peninsula the outbound interchange reports. Outbound bills of lading of the four trunk lines are signed by the joint agent. Expenses of maintaining the North Portland station are prorated among the four lines by car count, loaded and empty, with the joint facility invoice prepared by the operating road, UP or SP&S. The joint agent recommends no routings for shippers and receives no open-route car orders. Usually there are four deliveries and two pickups daily of cars moving to or from Peninsula by SP&S or UP. Cars from Peninsula could move by UP to the pass near Peninsula Junction, to Kenton Yard (about 2.6 miles southeast of Peninsula Junction) or to Albina Yard. Cars picked up from Peninsula by SP&S usually move to Vancouver. In addition to the above-described North Portland Freight Station, there is a yard office at the eastern end of the interchange tracks. The yard office is maintained jointly by

SP&S and UP under terms of a 1912 agreement which established the North Portland Freight Station. Four clerks at the yard office are UP employees and four clerks at the North Portland Freight Station are SP&S employees.

Peninsula also provides local intra-plant and intra-terminal service. It has established Local Switching Tariff No. 23, effective September 23, 1965 (not applicable to rail line haul service), which among other things provides a $22.44 per car charge for each car movement and service charges for the handling of livestock. No other switching tariff is published by it. Peninsula solicits no traffic and traces no shipments moving beyond its line. Revenue from its connecting rail carrier service is derived from a division of revenue, billed and collected by the trunk line, generally amounting to $29.25 a car when the car revenue exceeds $60. The agreed rate divisions were established by Joint Division Sheet 8-R issued by North Pacific Coast Freight Bureau, Seattle, Wash., effective July 1, 1964. Usually the line-haul carriers absorb the division charges. Its locomotives and crews operate two 8-hour shifts each day of the week, one from 9:00 a.m. to 5:00 p.m. and the other from 9:00 p.m. to 5:00 a.m. Light repairs of roadbed and equipment are made by regular Peninsula employees and heavy repairs by part-time employees. Since January 1, 1968, by agreement with Portland Livestock, Peninsula employees load and unload livestock.

Basic Labor agreements were entered into by Peninsula on April 14, 1943, with the Brotherhood of Railroad Trainmen and on June 15, 1947, (since modified) with the Brotherhood of Locomotive Firemen and Engineers. Peninsula engineers are paid $29.05 or $32.68 a day for service exclusive of repairs and maintenance with no holidays. They receive vacation and insurance benefits equivalent to employ-

ees of trunk-line carriers. Switchmen receive $27.88 a day and the footboard yard master $30.21 with seven annual holidays, extra pay for work on holidays, and vacation, insurance and welfare benefits similar to the engineers'.

United has agreed to manage Peninsula after the purchase in accordance with policies of its director, including supervisory, accounting, stenographic and other necessary managerial services as presently provided. United may terminate the agreement on 6 month's notice and the purchasers may terminate it on 30 day's notice.

During 1960, Peninsula handled 4,993 loaded or partially loaded cars compared to 2,748 cars in 1967. The latter represents about 39 percent of all cars interchanged at North Portland. The other 4,300 cars were interchanged between SP&S, NP, and GN, on the one hand, and, on the other, UP. From 1960 through 1967, there was a decrease in movements of livestock and packinghouse products and an increase in wood products. For example, in 1967, 34 percent of the cars handled transported wood products, 33 percent chemicals, 8 percent livestock, 7 percent packinghouse products, 13 percent paper products, and 5 percent other. In 1960, 16 percent of the cars handled wood products, 8 percent chemicals, 48 percent livestock, 15 percent packinghouse products, 6 percent paper products, and 7 percent other.

The statement of assets and liabilities of Peninsula as of February 1967, reveals total assets $239,716, including current assets, $35,038 (cash on hand, $17,365, accounts receivable, $7,888, materials and supplies, $8,669, and prepayments of insurance and other, $1,116), properties—transportation road and equipment, less depreciation, $196,938, and miscellaneous physical property, $7,740. Its expense

and retained income statement for each of the calendar years, 1962 through 1966, and for February 1967, reveals, among other things, total railway operating expenses for February 1967, $14,774, and for 1966, $81,244, total income before fixed charges for February 1967, a minus ($725) and for 1966, $13,320 less miscellaneous rents paid, $1. Rent for leased road equipment for 1966 was $3,200 and for January 1967, $533. The balance of retained income for February 1967, was $7,504 and for 1966, $8,762. At the beginning of 1962, its retained income was $151,208, which by the end of February 1967, was reduced to $7,504, after adding annual income (less losses), and subtracting dividends of $167,556 paid during 1966.

Rivergate. Industrial District (Rivergate) consists of about 2,942 acres of public owned peninsula land at the junction of the Columbia and Willamette Rivers generally north of and adjacent to Portland's corporate limits. This land is under the jurisdiction of, and is being developed by, The Port for industrial use. It has about 6 miles of water front on 40-foot navigation channels of the Willamette and Columbia Rivers. Presently there are five industrial activities within Rivergate together occupying 265 acres, or less than one-tenth of the ultimate available area. These are Ashgrove Lime and Portland Cement Company, Conmetco Division of Consolidated Freightways, Collier Carbon and Chemical Company, and Oregon Steel Mills on the western side and the Zellerbach Pole Yard on the eastern end. Much of it is marsh land to be filled by dredging operations. An 18-month planned study of a 14 square-mile peninsula area including Rivergate by The Port's consultants, Daniel, Mann, Johnson, and Mendenhall of Los Angeles, Calif., known as the D.M.-J.M. report was dated September 14, 1967. Recommendations therein include a Rivergate railway system connecting with rail trunk lines. Two alternate

Rivergate rail access routes include (1) that over the existing tracks of The Port which connect with those jointly owned by SP&S and UP entering the southwestern area of Rivergate, and (2) the possible construction on the eastern side of Rivergate of an SP&S main line extension or an extension of Peninsula's tracks into the area.

SP&S, a class I railroad, and a wholly owned subsidiary of NP and GN, operates over lines generally extending from Spokane through Pasco along the north side of the Columbia River to Vancouver, Wash., thence across the Columbia River through North Portland, thence across the east-west line of UP on the peninsula, and thence across the Willamette River, through Doane Lake Yard and Willbridge, Oreg., to Guild Lake Yard. The latter connects with Portland Terminal Company tracks in downtown Portland. A connecting track at the intersection of SP&S and UP lines on the peninsula affords access to Barnes yard. SP&S has trackage rights at Barnes Yard and at Terminal No. 4. UP and SP&S jointly own tracks extending from Barnes Yard to the southwestern side of Rivergate which connect there with those of the Port of Portland. The SP&S Vancouver-Willbridge track, constructed in about 1908 with an industrial spur at North Portland, is jointly owned by SP&S and NP. In 1909 OWR&N (UP) constructed a track connecting Albina with the spur track, and a year later built a bypass track at the North Portland Junction. The bypass enables operation between Albina and North Portland interchange tracks without entering the SP&S-NP main line. SP&S and NP switch cars at North Portland on a 2-year alternating basis. Additionally, SP&S owns Oregon Trunk Railroad extending from Wishram, Wash., a point on the SP&S line, to Bend, Oregon, and also owns Oregon Electric Railway Co., extending south from Portland to Eugene,

Oregon. SP&S directly serves industries on its lines and those on lines used jointly by it located on the southwest side of the Willamette River at Portland including industries and docks also served by Portland Terminal Company. It serves industries at East Portland by use of the UP-SP steel bridge across the Williamette River near the Portland Terminal Company's Depot and yard. SP&S switches cars to and from points in the East St. Johns and the Terminal No. 4 areas north of the Williamette River and south of Rivergate. SP&S delivers cars daily to the North Portland interchange tracks at 2:30 a.m. and 11:00 a.m. and picks up cars there at 9:30 a.m. and 6:00 p.m. UP also picks up and delivers cars there daily at 6:30 a.m. and 2:30 p.m. The switching distance from North Portland interchange tracks to connection with SP at Albina yard or Portland Terminal Company Hoyt Street yard is about 6 miles and cars switched from and to those points should require about one hour. North Portland line haul traffic of NP and GN is usually moved twice daily to and from Vancouver. SP&S switches all Vancouver cars including those of UP. SP&S assesses a tariff switching charge for movement of cars to and from Peninsula interchange. It is possible for GN, NP, and Burlington under joint arrangements to handle Milwaukee traffic to and from North Portland interchange tracks. SP&S as owner of Peninsula could obtain Peninsula trackage rights which are essential to any agreement for switching operations. Presently Milwaukee could interchange cars with SP&S at Vancouver for movement to the peninsula by payment of a division of the through rate. In the absence of Milwaukee trackage rights there the receiving carrier could designate car delivery points of Milwaukee cars. With interchange trackage rights at North Portland it could enter into a car pulling agreement for movements from Vancouver.

SP&S indicates that the extension of Peninsula to serve the Rivergate is uncertain because of heavy curvature, impaired clearances, and low standard tracks of Peninsula, but alternation will become necessary with growth of the district; that a new direct access track from the SP&S main line at North Portland may be feasible; and that if such a track is constructed SP&S and UP have assured the Port of Portland they would provide service similar to that now available in the southwest part of the district. SP&S has made no decision respecting the planned additional access route to Rivergate. It expects to provide adequate switching service into the area as required.

SP&S opposes any ownership of, or trackage rights to serve, Peninsula by SP and Milwaukee, and indicates such rights and ownership would result in unnecessary duplicating tracks and service contrary to the public interest. It represents that existing routes, rates, and traffic will not be affected by the SP&S-UP proposed purchase of Peninsula. Milwaukee and SP now serve Peninsula shippers through connecting carriers and use of joint rates and routes. UP and SP&S and its parent lines provided line-haul service for about 70 percent of Peninsula's traffic during 1966, and 82 percent in 1967. The interchanging of 3,640 cars handled during 1966, between Peninsula and UP and SP&S and parent lines was 54 percent for SP&S and parent lines and 46 percent for UP. Twenty percent of the cars were routed SP and 1 percent Milwaukee. In 1967, SP routed 17 percent and Milwaukee 1 percent of the line haul for 2,748 handled by Peninsula. Nevertheless, a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching

carrier has a solicitation advantage. If Milwaukee has no direct Rivergate access on competitive traffic it must absorb an SP&S switching charge (presently 6 cents a hundredweight) and pay a Peninsula rate division of $29.25 a car when the car revenue exceeds $60, on its traffic which would move through East St. Johns. Usually, line-haul carriers absorb no switching charges on unit train service or cars containing low rated commodities, and the payment of such charges by shippers discourages business. SP&S indicates Milwaukee might participate in a greater share of Peninsula traffic if its operation is extended to Portland. The SP&S representative concedes that if Milwaukee owns no part of Peninsula and cannot use the North Portland interchange tracks, it cannot compete equally with SP&S for Peninsula traffic. However, SP&S is willing to accept the standard section 5(2) proceedings' conditions (See *Southern Pacific Company—Merger—Pacific Electric Railway Company*, 327 I.C.C. 38) in event of a grant to assure participation by SP and Milwaukee in traffic moving to and from Peninsula as follows:

> Upon consummation of the acquisition, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission.
>
> The present neutrality of handling traffic inbound to Peninsula by UP and SP&S shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through their connections with UP and SP&S and its parent lines, without discrimination as to routing or movement of traffic and without discrimination in arrangement of schedules or otherwise.

The present traffic and operating relationships existing between Peninsula on the one hand and all lines reaching Peninsula through UP, SP&S or its parent lines on the other, shall be continued insofar as such matters are within the control of UP, SP&S or its present lines.

UP, SP&S and its parent lines shall accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination, in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

UP, SP&S or its parent lines shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways.

Any party or person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction of the Commission may be retained to reopen this proceeding on the Commission's own motion for the same purpose.

SP&S first became aware of United's desire to sell Peninsula in 1963, but serious purchase negotiations were not commended until sometime in 1966. When UP learned of the negotiations it became a party to them. If the application of these carriers is granted they intend to continue the corporate entity of Peninsula and its present management with present employees under joint supervision by the purchasers. The same management would permit an orderly carrier transition. SP&S has no objection to the Commission's prescription of conditions for protection of employees

as set forth in *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672, as follows:

> During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date or such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

The SP&S parent companies' ownership is in issue in *Great Northern Pac.—Merger—Great Northern, supra.* Pursuant to proposals therein, on October 26, 1966, Milwaukee entered into a written agreement with GN, NP, Chicago Burlington & Quincy Railway, SP&S, and the New Company (The Great Northern Pacific & Burlington Line, Inc.), which as pertinent provides:

> Effective upon the consummation of the consolidation proposed in Finance Nos. 21478, et al., the Milwaukee shall receive all of the six (6) conditions as sought by it in the aforesaid proceedings, as follows:
>
> > ***Condition No. 2—Entry into Portland and Trackage Rights between Longview Junction and Portland.***

Provisions of the agreement relating to implementation of Condition No. 2 require the New Company or SP&S, where possible, to grant Milwaukee trackage rights over present NP and SP&S tracks between Longview Junction and Portland, including the right to serve on an equal basis all pres-

ent and future industries at Portland and intermediate points and the use of New Company facilities at Portland necessary for the switching of traffic to other railroads and industries. There is no specific reference therein to North Portland, or use of the North Portland interchange tracks.

The SP&S financial statement as of February 28, 1967, shows total assets, $139,634,532, including current assets, $12,775,147, special funds, $123,381, investments, $30,586,097, properties less depreciation and amortization, $95,735,982, and total other assets and deferred charges, $413,925. Liabilities include current liabilities (exclusive of long-term debt due within 1 year), $8,928,010, long-term debt due within 1 year, $793,842, long-term debt due after 1 year, $45,650,781, reserves, $156,042, other liabilities and deferred credits, $158,704, capital stock, $40,000,000, capital surplus, $9,300,000, and retained income, $34,647,153.

UP, a class I railroad corporation, as pertinent, operates over trackage extending (1) from Seattle to Portland, (2) from Portland, through O. T. Junction, and Hinkle, Ore., Pocatello, Idaho, and Cheyenne, Wyo., to Omaha, Nebr., (3) from Cheyenne, through Denver, Colo., to Kansas City, Mo., (4) from Spokane, Wash., to Hinkle, (5) from O. T. Junction, Oreg., to Bend, Oreg., and (6) from Pocatello to Los Angeles, Calif. UP connects at Bend with GN which latter carrier's line extends through Chemult and Klamath Falls, Oreg., and Bieber, Calif., to connect there with Western Pacific extending through Sacramento to San Francisco, Calif. UP tracks enter Portland from the east forming a great loop extending from a wye near Troutdale, 14 miles east of the Williamette River at Portland. One track extends from Troutdale generally west parallel with the Columbia River through Kenton Yard, Peninsula Junction, across the SP&S-NP tracks which enter Portland from the north, thence

through Barnes Yard to the southwestern side of Rivergate and Terminal No. 4, and returns along the north side of the Williamette River through St. Johns Junction located in Swan Island Industrial Park, through Albina past the entrance of the Steel Bridge (which affords access to the Portland Terminal Company's yard and depot in downtown Portland) to East Portland (junction with SP), thence generally east through Sullivan Gulch to Troutdale. Track at the west end of the loop near Barnes Yard jointly owned by SP&S connects with Rivergate where UP has served Ash Grove Lime and Cement Company. An OWR&N (UP) track segment extends from North Portland interchange tracks, through St. Johns Junction, and Albina Yard to East Portland. This track, not a main track, was mentioned in connection with SP&S tracks. It crosses the western end of the UP loop as does the SP&S-NP tracks west thereof. This segment of track is of particular significance in these proceedings. SP traffic now moves or is expected to move over it. An issue respecting congestion of traffic on the track segment is raised by UP in its opposition to the SP proposals. The distance over the segment from North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. From the connection of the North Portland interchange tracks with Peninsula over the OWR&N tracks to its intersection with the UP track at Peninsula Junction is about 2.04 miles. At this intersection connections permit switching in four directions. Operation over the turnouts there is limited to 15 miles per hour. Near this intersection UP also has a bypass track which will accommodate about 10 cars. The distance from Peninsula Junction over the segment south through a 1-mile tunnel to St. Johns Junction is about 2.16 miles and the distance beyond St. Johns Junction over the segment to the north end of Albina Yard is 1.02 miles. The track segment generally is level with the exception of the 5/10 of 1 percent grade increase from Albina Yard to the

center of the tunnel. There is only one significant highway grade crossing on the segment at Columbia Boulevard which has a flashing light signal. There are also two or three private grade crossings near Peninsula Junction. Between Albina Yard and North Portland there is a 131-pound single-line track laid on rock ballast having no curves which create operating problems. Operation over the segment of track between Peninsula Junction and Albina Yard is presently controlled by a central traffic control system from Albina Yard. Albina Yard is a large and important classification and transfer yard of UP including about 44 tracks which will accommodate from 15 to 20 cars each extending about ¾ of a mile in length. The Williamette River lies along the western side of the yard and a super highway and a bluff lie along its eastern side limiting expansion. However, a map in evidence reveals that the yard at its center is about 500 yards wide and near its south end 666 yards wide. Most UP traffic to or from the Portland area moves through this yard. There is a 400 by 150-foot freight house at the south end of the yard. This is used in part as a salvage depot by UP and in part by shipper lessees. All of the tracks are used for switching purposes by UP. It endeavors to keep open one or two of the center tracks in the yard to accommodate through traffic. None of the tracks are permanently designated as running tracks although a substantial amount of through traffic moves through the yard. UP operations at Albina Yard are represented as taxed to capacity, with no room for expansion there. Switch engines operate out of there to serve Kenton Yard, North Portland Barnes Yard, East Portland, Sullivan Gulch, and Portland Terminal Company. They move, in addition to freight, passenger trains to and from Portland Station. Two such trains operate each way daily through Sullivan Gulch. Other passenger

trains moved by engines from Albina operate out of Portland station over the SP&S main line through North Portland and not through Albina Yard. Five UP freight trains operate each way daily over the track segment between Albina Yard and North Portland Junction. Delays at North Portland Junction interlocker are not uncommon with some delays as long as 80 minutes. SP uses the track between Brooklyn Yard and Albina Yard for freight moving to and from North Portland. The speed of traffic through the interlocker at East Portland is limited to 8 miles an hour. SP proposes to handle cars from Brooklyn to North Portland. UP represents that if the SP applications are granted congestion would occur principally on the single-track segment between St. Johns Junction and Peninsula Junction; that three fourths of the UP trains arriving at Albina Yard via Kenton are delayed from 15 to 180 minutes because of Albina Yard congestion. Also, there is a 1.2 percent grade on the UP track 1 mile east of East Portland which tends to retard car movents. Usually engines stationed at Kenton Yard are used for switching between Albina Yard and North Portland. There has been a consolidation of the Kenton Yard and Terminal No. 4 engines to eliminate congestion of traffic. There were about 40 to 56 switching moves daily in the Peninsula Junction area during 1967. For example, an average of 40 cars a day moved between October 1 through October 14, 1967, and an average of 37 cars a day moved between January 14 through 27, 1967. From January 26 through January 27 and from October 1 through October 14, 1967, traffic clearances in excess of 30 minutes between Albina Yard and North Portland interchange occurred from about 4 to 11 times or an average of 7.5 times daily. There are four transfer SP trains handled daily at Albina Yard. About six UP trains move each way in addition to trains of

NP, GN, and SP&S over tracks north of North Portland or a total of about 55 trains daily use those tracks. About 30 minutes time should be required to operate a switch engine with a few cars over the cleared track segment between North Portland and Albina Yard. However, an average of about 30 hours has been required for the movement of SP cars and also those of UP between Albina Yard and North Portland. UP does not consider a 30-hour transit time adequate service and has endeavored to reduce the running time by the described consolidation of its Kenton-Terminal No. 4 terminal service, by the establishment of the above described central traffic control, by breaking trains at Seattle, Dow, Hinkle, and Pocatello to avoid switching at Albina Yard, and by increased operation through Sullivan Gulch.

There is a double track extending from the south end of Albina Yard to East Portland and the junction of the SP there. Even though traffic congestion exists at Albina Yard, UP nevertheless represents that it can provide Rivergate any service through Peninsula needed and represents that its present service in the involved area meets shippers' demands for service. The Steel Bridge crossing the Willamette River at East Portland is jointly owned by SP and UP. The bridge, as noted, allows UP and SP to connect with the tracks of the Portland Terminal Company, the Portland Yard, the SP&S Hoyt Street Yard, and the SP&S and NP Guild's Lake Yard, which permits SP to interchange traffic at the latter yard with SP&S or NP. Portland Terminal Company is a terminal switching company owned 40 percent by UP, 40 percent by NP, and 20 percent by SP.

UP, as noted, physically connects with Peninsula at North Portland, and interchange junction point and station on GN, NP, SP&S, and UP, within the Portland switching district. The physical interchange of line-haul traffic moving

by UP or its connections is performed by UP. On traffic moving to and from SP via SP&S, NP, GN, and UP from and to industries located on Peninsula, SP absorbs the Peninsula's rate division, and on traffic in which Milwaukee participates through joint routings, no switching charges are passed on to the shipper or consignee. UP expects to continue its policy of permitting line-haul carriers having no physical interchange with Peninsula to reach, through existing joint rates and routes, industries on the latter's line.

UP's position in supporting its application and in opposing the petitions for inclusion and applications for rights is that a grant of the UP-SP&S application would permit continuation of the Peninsula operation as a separate switching company by trunk line owners at North Portland interchange tracks and the joint operation of the freight station and yard there for their own traffic and an extension of the responsibility of these carriers for continuation of switching services at North Portland for other carriers. UP represents that management of Peninsula would become difficult and indecisive with four owners and that limited ownership would assure keeping the size of the yard facilities and costs of its operation at North Portland at a minimum. UP opposes the SP operation through Albina Yard principally because of congestion which it might create and believes the operation would result in uneconomical and wasteful conditions there. It represents that the operation of SP trains through Albina Yard is not practical because of the large number of trains already moving through the yard.

At the request of The Port and the Commissioner of Public Docks, a railroad conference was held at Portland on June 20, 1967, to consider elimination of non-competitive

switching charges to or from industries located on The Port's property at Swan Island (Albina) and Rivergate to encourage industrial development there. Thereafter, railroads participating in the conference agreed to establish a single basis of switching charges at all common points within Northern Idaho, Washington, and Oregon, with switching charges to be absorbed by the line-haul carriers where the line-haul minimum revenue is $100 a car after absorption, and no absorption of switching charges when specific tariff rate items are excluded. UP represents that when the agreement is implemented all industries within the Portland Switching District including The Port's Property area served by Peninsula, and points in North Pacific Coast Territory will be on a competitive relationship except for the two conditions noted. UP opposes the petitions of Milwaukee and SP and the SP applications because it represents that all industries located on Peninsula can be served adequately either directly or through applicable effective joint rates and through routes, under the UP-SP&S proposal. It desires to protect its existing traffic and facilities investment. However, a representative of UP indicates that the cost to Milwaukee for handling traffic moving to or from Peninsula with no access right there would be greater than that of UP. It is possible under the conference switching agreement that by payment of the UP or SP&S switching charge the minimum car revenue would be less than $100 resulting in payment of the switching charges by the shipper and refusal of the shipper to use Milwaukee's service. Also, on a shipment moving from a Peninsula industry to Arizona, routed UP from Peninsula interchange tracks to East Portland, thence SP beyond, SP would absorb the switching charge from Peninsula interchange to East Portland. The principal interest to UP in such a move would be the switch-

ing charge. UP generally has been unwilling to negotiate joint rates with Milwaukee between competitive points such as Spokane, Seattle, and Tacoma. Line-haul rates of carriers (but not all carriers) are applicable on traffic moving to or from Peninsula industries, and when line-haul rates are not applicable, the shipper or consignee must pay an extra switching charge.

The UP financial statement as of December 31, 1966, reveals total assets of $1,902,430,048, including current assets, $279,303,599, special funds, $819,004, investments, $479,073,070, properties less recorded depreciation and amortization, $1,136,364,928, and other assets and deferred charges, $6,869,447. Liabilities and shareholder equity include current liabilities, $117,797,009, long term debt due within one year, $17,757,016, long term debt due after one year, $199,999,694, reserves, $34,423,776, other liabilities and deferred credits, $28,293,827, capital stock, $299,292,350, capital surplus, $9,374,305, and total retained income, $1,195,492,071. The UP income statement for years 1962 through 1966 reveals among other things, total fixed charges of $9,104,258 in 1962 and $13,035,761 in 1966, and net income after fixed charges and other deductions transferred to retained income, unappropriate, for 1962, $80,550,226, and for 1966, $106,268,617. The total UP retained income, unappropriate, at the end of 1966 was $1,160,899,972.

SP, a class I railroad, operates over trackage generally extending (1) from Portland south through Eugene and Klamath Falls, Oreg., Sacramento, San Francisco, and Los Angeles, Calif., Phoenix and Tucson, Ariz., El Paso and Houston, Tex., to New Orleans, La., (2) from San Francisco through Sacramento, Calif., Reno, Fernley, Weso, and Alazon, Nev., to Ogden, Utah, and (3) from Fernley to Klamath Falls. Service over these tracks is rendered by SP at many

points south and east of Portland in Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, and Louisiana. At Portland, the northern terminus of SP tracks, as noted, connects with those of UP at an interlocking plant about 375 feet south of the eastern end of the UP-SP Steel Bridge across the Williamette River at Portland. SP maintains a large switching yard at Brooklyn known as the Brooklyn Yard about 2.6 miles south of the interlocker. Trains moving into Portland from the south over SP lines are generally sorted and blocked at Eugene, Oregon, about 125 miles south of Portland and move to Brooklyn Yard for further blocking if required before they are received by UP at East Portland. SP traffic to or from Peninsula moves principally over UP tracks from East Portland through Albina Yard, St. Johns Junction to the North Portland interchange tracks. In some instances SP traffic also moves from East Portland across the Steel Bridge to the Portland Terminal Company yard thence to Hoyt Street Yard for interchange with SP&S and movement over the SP&S main line tracks to North Portland interchange. The distance from Brooklyn over the UP tracks to Peninsula is about 8.59 miles. An SP engine and crew is used to move cars from Brooklyn through East Portland thence over the UP tracks to Albina Yard where they are received by UP for movement to Peninsula. The switch engine and crew of SP performs service from North Portland to Albina Yard as UP's agent. Similarly an SP switch engine and crew moves cars from Brooklyn over the alternate SP&S route to North Portland by operating as far as the Portland Terminal Company's yard where they are received by Portland Terminal Company, as an agent for the latter company. SP represents that if it is granted bridge trackage from the interlocker at East Portland to

Peninsula at North Portland interchange tracks its engines and crews can operate from Brooklyn to North Portland. About 2 hours switching time would be required for a SP engine and crew to operate between Brooklyn and Albina Yard and an additional 1.5 hours between North Portland and Albina Yard or a total of about 3 hours and 30 minutes. There are delays in the movement of traffic over the UP tracks between those points. A 10 percent random sample consisting of 42 cars (from a total of 410 cars) of SP traffic switched to and from Peninsula during 1967 in evidence reveals among other things an average of 32 hours and 10 minutes required for car movements from the SP interchange points to Peninsula when switched by UP or SP&S and an average of 55 hours and 16 minutes when moved from Peninsula to the SP interchange point. SP represents that 30 hours or more required for the movement of cars between Albina and North Portland interchange is excessive and that SP with bridge rights can provide faster service. From 25 to 57 trains, or an average of 40, move over the UP tracks between Albina Yard and North Portland each 24 hours. SP anticipates no operating difficulties or labor complication in connection with its proposed operation over the described UP North Portland-Brooklyn Yard tracks. During 1967 about 490 cars were moved between Brooklyn Yard and North Portland interchange tracks over the described routes. It further represents that the proposed operation of unit trains of iron ore over the described UP tracks to and from Peninsula is feasible.

SP proposes to provide service which will meet the shippers' transportation needs including a scheduled operation to and from Peninsula and to establish Portland rates which include service to and from Rivergate. Presently local moves between Peninsula and many non-competitive Oregon

points require the payment of switching charges in addition to the rate to or from Portland. For example, four carloads of lumber moved during January, February, and April, 1967, by SP from Dallas, Springfield, Millersburg, and North Bend, Oreg., to Shefton Plywood Company, North Portland, for which separate switching charges were paid by the shipper. Such charges usually amount to $32.29 a car. SP absorbs switching charges in the Portland area if the circumstances justify, but does not absorb such charges on shipments from Oregon origins to Peninsula on low-rated non-competitive traffic. SP represents that Rivergate is unique in that it includes several thousand acres of publicly owned industrial land adjacent to a metropolitan area suitable for use by industries; that the successful development of that property depends upon the flexibility of rail service and that such service for the development involves major markets in California and other states served by SP.

The SP financial statement as of December 31, 1967, shows total assets $2,449,441,331, including total current assets, $223,519,955, total special funds, $1,490,344, net investments, $182,223,376, total properties less recorded depreciation and amortization, $2,028,866,435, and other assets and deferred charges, $13,341,221. Liabilities include current liabilities, $186,038,487, long-term debt due within 1 year, $45,704,211, long-term debt, $730,579,135, reserves, $10,234,715, other liabilities and deferred credits, $19,328,532, and total shareholders equity, $1,457,556,251. The SP retained income account as of December 31, 1967, reveals a credit balance of $1,032,681,210. The SP income account for the years ending December 31, 1966, and December 31, 1967, reveals among other things that for 1967 net railway operating income, $52,521,146, total other income, $39,927,418, miscellaneous deductions from income, $86,324,468, fixed charges, $31,607,107, and ordinary income, $54,717,361.

Milwaukee, a class I railroad, operates over main lines from Seymour, Ind., through Chicago, Ill., Minneapolis, Minn., Seattle and Tacoma, Wash., to Longview, Wash., a point on the Columbia River about 46 miles from Portland. Its main lines also extend from Chicago to Council Bluffs, Iowa, and to Kansas City, Mo. It serves the grain producing areas in Montana and eastern Washington and provides a connecting carrier service from those points to Portland. It also serves much of the forest products producing area in Idaho and Washington and industries in Tacoma, Seattle, Everett, and Bellingham, Wash., north of Portland. Also, service is rendered at the industrial cities, among others, of Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, Davenport, Rock Island, Moline and Bettendorf. At the time of hearing it performed no physical operations to and from the Portland area and was awaiting final disposition and consummation in *Great Northern Pac.—Merger—Great Northern, supra.* In that proceeding, the merger of GN, NP, Pacific Coast R. R. Company, and the Chicago, Burlington and Quincy Railroad Company into Great Northern Pacific & Burlington Lines, Inc., was authorized by the Commission in its report of November 30, 1967, subject to conditions set forth in Appendix "L" thereof, which among things, permits upon consummation of the transaction entry by Milwaukee into Portland and trackage rights between Longview Junction and Portland described above in connection with the evidence presented by SP&S. If the Milwaukee petition herein for inclusion is authorized it expects to operate fast trains between Chicago, Seattle, and Portland and between Portland and Sumas, Wash., with connection at the latter point with British Columbia railroads. However, such service cannot be established if terminal delays occur at Portland which offset the proposed

service advantages. Its proposed service at Portland includes physical operation of its equipment to and from the Peninsula interchange tracks at North Portland. All the industries on Peninsula would be served as on-line industries with no absorption of switching charges. Despite postponement of the effective date of consummation in the Northern Lines merger case pending consideration of various petitions, Milwaukee expects the merger will be confirmed and consummated within a reasonable time, and contingent upon its extension of operations to Portland, requests joint and equal ownership of Peninsula stock with other trunk lines and proposes to assume its share of the portion of the stock and indebtedness as set forth in the application. Its joint ownership is considered essential to its Portland operation to industries located on Peninsula and at Rivergate. Peninsula is the only terminal facility at Portland not owned by trunk lines presently serving that point.

Milwaukee has a centralized, computerized expedited service for tracing, reconsignment, and diversion of cars, and for the elimination of car delays. It owns 39,000 freight cars and in 1967 it transported 61,140 trailers in its trailer-on-flat-car service. It maintains facilities at various points for the loading and unloading of this type of traffic. Since 1963 it has maintained a 55.5 hour schedule service from Chicago to Seattle and 67.25 hour return. Milwaukee represents that if its request for joint ownership and direct access to Peninsula is denied and the northern lines merger consummated, Milwaukee traffic to North Portland would move to Guild's Lake Yard located about 6 miles south of North Portland, by Milwaukee and thence switched by other carriers from that point back to North Portland requiring an extra day in transit. It further represents that such de-

nial would place it at great disadvantage in competing in the Portland area because exclusive control by UP and SP&S of Peninsula would enable those carriers to fix the switching charges of Peninsula to be absorbed by Milwaukee or paid for by shippers; that those carriers could obtain trackage rights over the Peninsula lines because of their joint ownership; and could direct the service and switching to and from points on Peninsula tailored to meet operating conditions of the owner lines with lesser considerations for operations of Milwaukee. If Milwaukee's requests are granted, it expects to absorb the switching charges in the Portland area to the same extent that other carriers absorb them. It represents that the granting of its petition would take nothing of real importance from UP and SP&S because the real potential traffic lies in Rivergate's future development and that the purpose of its petition was to obtain assurance that it will not be foreclosed from serving Peninsula and Rivergate shippers.

Milwaukee is not owned or controlled by any other railroad and does not own or control any other parties to the instant proceedings directly or indirectly. Its officials and directors have no common interest in such parties to this proceeding. Milwaukee does own an interest in a number of other transportation companies not particularly pertinent to these proceedings.

As of December 31, 1967, the Milwaukee financial statement reveals total assets of $733,708,671 including current assets, $76,187,097, and special funds, $1,676,358, investments, $26,067,221, total property less depreciation and amortization, $625,512,008; other assets and deferred charges, $4,265,987. Liabilities include current liabilities, $54,060,146, long-term debt due within 1 year, $15,925,685, long term debt due after 1 year, $284,381,173, reserves, $1,448,596,

other liabilities and deferred credits, $4,085,187, and shareholder equity, $373,807,884. Its income account for the years ending December 31, 1963, to and including December 31, 1967, reveals, among other things, 1967 net railroad operating revenue, $11,439,385, other income, $17,177,970, fixed charges, $8,403,546, other deductions, $5,669,621, ordinary income, $2,733,925, prior period items, $10,222,000, and net income transferred to retained income unappropriated, $12,955,925. Its retained income statement for the years December 31, 1963 to 1967, inclusive, reveals a credit balance as of December 31, 1967 of $104,249,684.

COST STUDIES OF SP AND UP

SP presented cost study evidence to show (1) the estimated variable cost to SP for UP and SP&S to handle traffic between SP and Peninsula, (2) the estimated variable cost to SP for handling traffic to and from Peninsula, and (3) the estimated annual net effect on SP resulting from handling traffic directly to and from Peninsula instead of bridging via UP and SP&S. The study covers a proposed operation, and certain trackage assumptions, operating estimates of informed personnel, all known factors, and a 10 percent (42 cars) random sampling of 418 cars handled during 1967 by SP moved to and from Peninsula were relied upon for its preparation. The study shows a weighted average car cost (35 UP cars and 7 SP&S cars) of $44.27 to SP when UP and SP&S handled the traffic. Effective tariff charges of the involved carriers were used in this portion of the study. The second part of the study shows the estimated variable cost to SP when handling its own traffic between East Port-

land and Peninsula for 1 carload per round trip as $166.64, 5 carloads $12.93, 10 carloads $20.94, 15 carloads $15.53, and 20 carloads $12.93. The total of trackage, switching, and car rental costs were used in computing this portion of the study. The trackage costs are calculated upon a percentage of use by SP basis (0.58% for 1 carload round trip and varied increased percentages for greater numbers of cars), including 5 percent interest on reproduction costs, less depreciation ($5,360,000), estimated taxes ($22,000), and maintenance ($36,300). The use basis of computation was employed by assumption that the involved traffic would be a small percent of the total moved over that line and that a trackage arrangement similar to that used by SP in a Beaumont, Tex., arrangement would be applicable. An estimated round trip time of 205 minutes expanded 33 percent for nonproductive time and expanded and contracted for varying numbers of loads at $0.6755 average engine cost per minute was used in calculating the switching costs in this part of the study. The third part of the study, based upon the other two parts, reveals that for one carload round trip, if handled directly by SP, would result in an estimated annual net loss to SP of $44,600 and savings of $13,100 for 5 carloads, $85,200 for 10 carloads, $157,400 for 15 carloads, and $228,800 for 20 carloads, with a breaking point of 4.09 carloads a round trip.

UP presented similar cost study evidence which differed in three material respects, (1) the use of trackage cost based upon a numerical basis (described by UP as "user basis"[3]),

3. In *Missouri—K.—T. R. Co. v. Kansas City Terminal Co.*, 198 I.C.C. 4 at page 9, the Commission, Division 3, in its report states in part: Both petitioner and respondent conceded that just and reasonable compensation must include a reasonable return

that is, adjusted in relation to the number of users regardless of individual use, (2) use of the actual tax value ($122,000) on the involved property and maintenance, both computed on a "use" basis, and (3) use of a projection of the Portland Switching Study costs expected to be implemented during 1968. With these modifications, the UP study reveals (1) restated estimate of variable costs to SP by UP and SP&S handling of traffic between SP and Peninsula of $15.87 a carload weighted average (35 UP cars and 7 SP&S cars), (2) a restatement of estimated variable costs to SP for handling its own traffic from and to Peninsula for 1 carload round trip as $531.08, 5 carloads $109.55, 10 carloads $56.89, 15 carloads $39.30 and 20 carloads $30.63, and (3) a restated estimated annual net effect on SP resulting from its direct handling of traffic to and from Peninsula instead of using UP or SP&S connections, reflecting losses of $188,051 for 1 carload round trip, $170,965 for 5 carloads, $149,720 for 10 carloads, $128,280 for 15 carloads, and $107,740 for 20 carloads. Generally the studies of SP and UP differ substantially in their estimated annual net effects. In their preparation there was certain reliance upon estimates, at least one variation in the random sampling used, imponderables such as estimates and judgment factors used in calculations, and use of a 418 car frame (an unusually small number for most satisfactory results) from which a ten percent sampling was taken.

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upon the fair value of those zones of the terminal which petitioner has acquired the right to use. Two methods of computing that return are urged upon us. Petitioner urges the user basis, by which is meant that the petitioner should pay upon basis of the relation which its use of the terminal bears to the use of all the using carriers. This has been averaging somewhere in the neighborhood of 5 percent. Respondent urges the numerical basis, that is, adjustment in relation to the number of users of the terminal regardless of the extent of the individual use by those lines. As there are 11 users, petitioner's proportion under this basis would be one twelfth.

SHIPPERS' EVIDENCE

Zellerbach, the second largest producer of paper and paper articles in the United States and also a producer of industrial chemicals, has its principal manufacturing and shipping facilities located in the Portland area. It also has paper mills at Camas, Wash., and Wauna and West Lind, Oreg. It ships in excess of 1,100 carloads of the described commodities each month from the Portland area to various points throughout the United States. Zellerbach has or expects to establish four facilities in the Portland area. One is a distribution complex, Water Way Terminal Company, served by the Portland Terminal Company and Western Transportation. The latter is a certified water carrier owned by Zellerbach which has connections with a number of other carriers. At the time of hearing, Water Way Terminal Company facilities were being expanded and Zellerbach was negotiating for the purchase of a 1,500 water-front property located adjacent to Ashgrove Lime Company at the western end of Rivergate. The second is a pole yard located on 40 acres of land owned by Zellerbach at the eastern end of Rivergate. The pole yard, as noted, is served by Peninsula. The third facility is the planned construction of a 200,000 square-foot warehouse to be located on 44 acres of land purchased from Swift & Co. At the time of hearing the land purchase was waiting escrow clearance. The land is about 500 yards east of the SP&S main line at North Portland. The warehouse is expected to be used for the storing and distribution of products of the adjacent Zellerbach Flexible Packaging Division plant, the fourth facility.

During the 12 months ending November 30, 1967, 365 freight cars moved to or from the Flexible Packaging Divi-

sion plant and 638 freight cars (177 shipments) to and from the pole yard. The shipper's poles now move in 65-foot drop-end gondola cars supplied by the rail carriers. Sixty-four percent of the 177 pole shipments involved delays due to Zellerbach's inability to obtain suitable cars when needed. The delays ranged from 1 to 26 days, or an average of 4.5 days each.

Zellerbach supports each of the applications and petitions because authorization of the proposals would increase the number of carriers having direct access to Peninsula and increase its ability to obtain suitable cars, and because it desires service at its Rivergate facilities comparable to other transportation at Portland. It represents that such access could result in the elimination of a 22 degree curve in the present Peninsula tracks so that 85-foot pole cars can be accommodated thereon. Zellerbach represents that if SP had direct access to its pole yard, it would request that carrier's service more often. The Zellerbach representative could recall no instances in which it paid separate switching charges for service to and from its facilities located on Peninsula. Zellerbach indicates that the greater the number of connecting carriers required for handling a shipment the greater the number of rate divisions and cost of service.

Oregon Steel Mills, a division of Gilmore Steel Corporation of San Francisco, within the past 2 years has acquired 152 acres of Rivergate land where it is presently erecting a new steel plate mill. Several phases of construction of the mill are contemplated. The first phase cost is $35 million. Upon completion of the first phase mill, it will produce 200,000 tons of steel plate annually and upon completion of the entire mill the ultimate mill's capacity will be 700,000 tons. The mill site was located at Rivergate because it

affords room for the mill's expansion and for the location of related steel fabricating industries near it and because Rivergate is considered by this shipper as a transportation hub. There are presently steel plate mills located at Provo, Utah, and Fontana, Calif. The Rivergate mill will be the first producing steel plate mill located in the Pacific Northwest and its location will result in the establishment of a steel basing point at Portland, whereas up to this time the steel basing points have been at Provo and Fontana. Ore for use at the mill presently will be provided by Marconi Company transported by water carrier from Peru to Rivergate. However, Gilmore Steel Corporation owns large iron ore deposits near Mount Shasta, Calif., near a line of the SP. Arrangements are in progress for procuring iron ore at the Shasta location. Oregon Steel Mills expects to ship unit trains of ore from Shasta to the Rivergate mill and has obtained assistance and information respecting proposed transportation costs from SP, which in turn procured proposed costs of switching at Portland from UP. SP, prior to the filing of its applications, proposed to transport the shipper's ore from Shasta to the UP Portland interchange in SP equipment, including all terminal service charges at Shasta at $3.85 a gross ton subject to a tariff docketing proposal, and information received from SP respecting the proposed UP switching costs which was confirmed through the UP rate department was $.23 a gross ton from the UP-SP interchange at Portland to Rivergate. Oregon Steel Mills prefers a single train crew and through round trip unit train service. UP indicates it cannot provide this type of service at Portland because union contracts require the use of local power equipment and the payment of the Portland crew for a minimum work time. The shipper represents that it would start mining ore at Shasta as soon

as economically feasible, that its ore can move economically only in unit trains in the service of a single carrier with no connections and that it supports the SP applications to enable direct access to its Rivergate plant by SP through North Portland. The shipper is aware that major fill and track construction would be necessary before operation from Shasta through North Portland becomes possible. It indicates that Rivergate is being developed by use of public tax money and it believes direct access to Rivergate should be afforded through all rail carriers.

Williamette Wood Products, Inc., manufacturers stock for the manufacture of baby cribs at North Portland. Raw materials are shipped from Omak, Wash., to its plant by rail under an in-transit rate, where they are processed and shipped beyond. The shipper has used SP trailer-on-flatcar service for movements of its commodities beyond Portland to Los Angeles, Calif. Each week about one carload of the shipper's commodities are moved to or from North Portland. The shipper has relied upon service of SP&S, NP, GN, and UP and has no need for additional rail services or for additional terminal switching service at its plant. It supports the application of UP-SP&S and would like to have the continued service by the same railroad personnel at North Portland.

Morrison Oil Company operates a storage and packaging plant at North Portland and has relied principally upon SP&S for the provision of rail service to and from its plant. Each year it receives about 55 car loads of oil at the plant. It also receives cans and tires and antifreeze which move to the plant by truck. The antifreeze is shipped by water to Portland and moves locally by truck from St. Johns to Portland. This shipper's packaged products are shipped principally by truck and railroad from North Portland to points in Washington and Montana. Railroad shipments move from North Portland to the Butte-Missoula and Billings, Montana, area. This shipper supports the SP&S-UP

application because it believes that the acquisition will result in the continuance of present service which has been satisfactory and would assist it in developing additional business. However, the shipper admits that UP would not be particularly interested in its development of business at points in such states as Arizona, New Mexico, Texas, and Louisiana served by SP. The shipper was not aware that a shipment of its cans on October 10, 1967, from Ravenwood, Calif., routed SP-SP&S required 45 hours for movement from the SP interchange at Portland to Peninsula or that a shipment of cans on October 26, 1967, from Ravenwood, Calif., routed SP-UP to Peninsula required 37 hours for movement from the Portland UP connection to Peninsula.

Collier Carbon & Chemical Corporation, a Union Oil Company subsidiary, is constructing a new $2 million distribution facility north of the Ashrover Lime Company plant on the western side of Rivergate. The plant, to be in operation by the Fall of 1968, expects to use the direct service of SP, among other rail carriers, for the movement of its products from Rivergate. Urea, used in the manufacture of resins and fertilizer and as a cattle feed ingredient, is to be shipped by water carriers to the facility and to be reshipped by rail, truck, and water carriers to its customers. It is particularly interested in obtaining SP service for movements to western Oregon points and supports the SP applications because direct SP service would provide it suitable transportation to western Oregon points within provision of reasonable transit time, car availability, and rates. It has no preference as to the carrier switching its traffic to a belt-line or terminal company.

Serendip Industrial Materials of Portland, Oreg., supports the SP&S-UP application. It receives annually about 60 car loads of stone material at North Portland. The stone

is distributed to builders and metal refiners in the Portland area. Most of it is moved by GN from points in Washington and Canada although stone is also expected to be received from points east of Portland which would move by UP. This shipper has little interest in SP service, but if it receives stone from points south of Portland served by SP it would desire direct SP service to North Portland.

POSITIONS OF LABOR ORGANIZATIONS

Three of the eight labor organizations appearing in opposition to the applications and petitions presented evidence. The *Brotherhood of Railway Clerks of Portland Terminal Company* representing 300 employees of the latter company, particularly opposes the SP request for bridge trackage rights. The railway clerks maintain that the real purpose of SP is to enable its trains to bypass Portland Terminal Company and effect and interchange with SP&S, NP, or GN at North Portland instead of at the Portland Terminal Depot; that if bridge rights are granted, switching by Portland Terminal Company would decrease substantially; and that authorization of SP's request would result in increased traffic congestion on the involved UP track segment. This railway clerks organization has no objection to the proposal if limited to the interchange of Peninsula traffic at North Portland. It does not consider 30 hours transit time for the movement of cars from Albina Yard to North Portland reasonable.

The *Switchmen's Union of North America* is particularly interested in the welfare of 158 Peninsula Terminal Company employees. It opposes any grant of the applications or petitions permitting SP and Milwaukee to use interchange track facilities of Peninsula. It desires the continued handling of interchange traffic by Peninsula Terminal Com-

pany between SP and NP, GN, and SP&S and seeks employment security for its members. It maintains that services at Rivergate and North Portland are adequate. Starting in 1964 SP has on several occasions sought union assent to a change in the Portland interchange point for through trains from Portland Depot to a point north thereof.

The *Brotherhood of Locomotive Engineers of Union Pacific Railroad* opposes all of the applications and petitions and maintains that any grant thereof would affect engineer operations in the Kenton-Albina-East Portland-Barnes area. It maintains that the loss of even 1.5 car movements daily between East Portland and North Portland would reduce engine employees at Albina Yard. It desires maintenance of the status quo and represents that UP can provide all the involved services needed. However, objection by this organization to the SP&S-UP application to acquire Peninsula was withdrawn on brief, with a continuing objection to the SP and Milwaukee proposals. In the event of a grant of the latter carrier's proposals, it desires adoption by the Commission of employee protective conditions similar to those incorporated in an agreement entered into by the Brotherhood of Locomotive Engineers and Great Northern, Pacific and Burlington Lines, Inc., filed in Finance Dockets Nos. 21478 and 21480, as set forth in Appendix A to its brief filed June 17, 1968.

INTERVENERS' EVIDENCE

The Port's position is that Rivergate's development requires services of all the involved line-haul rail, barge, and ocean vessel carriers serving Portland with service at competitive rates, and that all the rail applicants should be afforded equal operating access to Rivergate. It expresses

a need for fast reliable freight service at Rivergate through Peninsula provided on equal terms by all present and future railroads serving Portland which can be accomplished by joint ownership. The Port desires the services of all the railroads to facilitate mechanized rapid handling of liquid and dry bulk commodities, containerized commodities, and other general freight between Rivergate and points throughout the United States. It asserts that single-car switching to and from small industries with so-called one-car sidings has become obsolete. Such switching is uneconomical because of engine and crew costs, and obsolete because trucks can more effectively perform a small shipment service.

The Western District Class I railroads traffic increased 36.2 percent in the 9 years following 1958. The Port's transportation consultant estimates that by 1990 traffic of those railroads will double, if adequate rail facilities are provided, and that Portland would share in its growth. Adequate facilities would include the most efficient mechanically fitted freight handling terminal with low freight handling costs possible through greater movement of intermodal traffic. After Rivergate's development, The Port estimates that from 500 to 600 cars or an average of 20,000 tons daily will move to and from the district; that daily service will require one unit train, one semi-unit train, one semi-unit trailer-on-flatcar (TOFC), train, two industry trains, and two switching runs, and that the types of service would include provision for (1) bulk commodity unit trains (never uncoupled), (2) semi-unit train service for handling the less mechanized traffic to move in blocks of 40 to 150 cars, (3) TOFC service, and (4) miscellaneous and switching service. Rivergate is represented as affording opportunity for use of new technology in rail terminal service by use of unit and

semi-unit trains, and the elimination of lost car movement time usually incurred at terminals. UP and SP&S, as noted, are the only carriers presently having direct access to Rivergate through the eastern and western entrances. The Port indicates that unless the four applicant railroads are afforded equal access to Peninsula its owners would crease unsatisfactory non-single-line switching conditions for the other lines; that unit train bulk traffic is impeded equally as much by switching delays as by traffic interchanges; that if Milwaukee traffic is switched by SP&S or UP before reaching Peninsula, Milwaukee's single-line efficiency to and from points in such States as Indiana and Iowa will be impaired; that if SP traffic is similarly switched, its single-line advantage to and from such points as Medford, Reno, Stockton, San Francisco, Fresno, Phoenix, El Paso, New Orleans, and Memphis will be limited. The Port represents that existing uncorrelated transfer of freight cars within the Portland switching District will not meet Rivergate's rail service needs; that uncoordinated switching operations at Portland result in a minimum 24-hour transfer time, and sometimes 3 or 4 days for operations across the switching district compared to a few hours required for cross-city truck movements. Peninsula assertedly will be useful to Rivergate only if it can handle unit trains of 100 cars or more which Peninsula's track facilities presently will not accommodate.

Economic and statistical evidence relating to Rivergate presented by The Port's Research and Planning Department reveals, among other things, the following: The Columbia-Williamette system is the second largest river improvement project in the United States. The Federal Government and The Port together up to December 31, 1967, expended $120 million in improving the system. Ultimate public and private investment at Rivergate is ex-

pected to exceed $500 million. The Research and Planning Department is responsible for obtaining the described D.M.-J.M. commercial engineering Rivergate survey, report, and recommendations. The Port's long experience in marketing and research and its recognization of current technological transportation changes influenced its support of joint ownership of Peninsula by all the line-haul railroads serving Portland. The value of water-borne imports and exports in the Portland Custom District increased 313 percent from 1954 to 1966 compared to increases during that time of 201 percent at Los Angeles, 128 percent at San Francisco, and 132 percent at Washington ports. The Portland oceanborne traffic increased from 8,535,686 short tons in 1955 to 10,489,989 tons in 1965 or 22.9 percent.

The Portland Commission of Public Docks, City of Portland, favors joint ownership and operation of Peninsula and direct access to Rivergate by all line-haul railroads serving Portland. It is particularly interested in the transportation cost to shippers for movements to and from Rivergate, and asserts that non-competitive transportation costs there would preclude consideration by industries of Rivergate as an industrial site. The Commission represents that establishment of a $100 per car line-haul revenue minimum as proposed in the Conference of Railroad Presidents June 20, 1967, agreement to establish a single basis switching charge at competing Pacific Northwest points would adversely affect Rivergate shippers' interest without equal ownership by all the line-haul railroads in Peninsula. Railroads with no such interest for economic reasons would be required to assess switching charges, while owner-carriers subject to their own tariff provisions could absorb switching costs on the basis of a lower applicable car minimum revenue. Numerous illustrations of instances in which this

might occur are in evidence. For example, a non-owner carrier subject to the P.C.F.B. Tariff No. 35, I.C.C. 1098, Item 685, naming a rate on cans, fibreboard, set up, of 40.5 cents a hundredweight, 14,000 pound minimum weight, from Portland to Banks, Oreg., representing a minimum car revenue of $84.70 would be required to assess an additional charge while an owner carrier would absorb such a charge. Also, pointed out is the second exception to the proposed switching agreement which provides that switching charges will not be absorbed in instances where excluded by specific tariff provision.

The Public Utility Commissioner of Oregon favors joint ownership of Peninsula by all line-haul carriers serving Portland. Evidence presented by the Commissioner covers geographical and physical characteristics of the involved transportation area. It reveals, among other things, that in addition to the five major railroads, NP, GN, SP&S, UP, and SP presently serving the Portland area, 275 motor carriers operate to, from, or within Portland. Fifty-one of these carriers are regular-route general commodity carriers all authorized to serve Rivergate within the Portland commercial zone. Tables in evidence presented by the Commissioner show that the annual operating revenue of Peninsula has ranged from a high of $161,292 in 1956 to a low of $75,949 in 1963. Its averge revenue per car for switching service increased from $7.93 in 1950 to $27.71 in 1966. Peninsula's net operating income has ranged from $39,253 in 1955 to a deficit of $4,153 in 1962. While it operated at a deficit in 1962 and 1963 its income has since considerably improved. The Commissioner represents that the future need of Peninsula is closely related to development of Rivergate and the granting to SP and Milwaukee of direct access to Peninsula would provide present and future industries

served by Peninsula direct service by all line-haul railroads serving Portland.

Through rates and charges of SP&S, GN, NP, and UP are presently applicable to industries served by Peninsula. SP does not interchange traffic at Peninsula and depends upon SP&S or UP switching service between the SP interchange at Portland (Union Station) or East Portland and the North Portland interchange. SP presently absorbs the switching charges on traffic moved to or from Peninsula subject to a per-car minimum charge of $67 plus increases. Peninsula industries pay UP or SP&S for switching between North Portland and East Portland when the published through rates do not provide for absorption of the switching charges. For example, a switching charge is applicable to noncompetitive traffic originated by SP in Oregon moving to Peninsula.

DISCUSSION AND CONCLUSIONS

The issues here first require an understanding of the treatment to be afforded the involved Portland area, including land and transportation facilities of the public, of all types of carriers there, and of the shipping industries. Recognition of the public interest, the carriers' competitive efforts, and the present and future traffic pattern in the entire Portland area is required. They are directly related to the success or failure of trunk line operations there. Some indication exists that segmentized consideration would be appropriate. For example, considering the trackage between Albina Yard and North Portland as other than part of the UP Portland (Albina Yard) terminal facility. The factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity. Ob-

viously, divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth, and development of the Portland area. Therefore, judgments here are necessarily based upon consideration of the involved area as a whole.

The lead applications and related petitions were filed pursuant to sections 5(2) or 3(5) of the Interstate Commerce Act. Under section 5(2)(b), approval of requests for control and ownership such as those involved here must be predicated upon conditions which would promote interstate transportation in the best public interest. In *N. Y. Central Securities Co. v. U. S.*, 287 U.S. 12, the Supreme Court stated, at page 25, that "the term 'public interest' **** has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities ****."

Section 5(2)(c) of the Act contains the essentials for the Commission's consideration before a proposal thereunder may be authorized. These are (1) the effect of the proposed transaction upon adequate transportation service to the public, (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved in the proposed transaction, (3) the total fixed charges resulting from the proposed transportation, and (4) the interest of the carrier employees affected. Adtionally, the public interest test is to be applied in light of the national transportation policy which includes the promotion of sound economic conditions and the development of a more efficient transportation system.

Section 5(2)(d) of the Act provides that:

> The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involv-

ing a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon finding that such inclusion is consistent with the public interest.

Section 5(2)(f) of the Act provides that:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(11) of the Act specifically relieves the applicants in transactions approved under section 5(2)(a) from operation of the antitrust laws and of certain other restraints, limitation, and prohibitions of law. However, the Supreme Court in *Seaboard Air Line R. Co. v. U.S.*, 154, 156, indicates that section 5(11) does not authorize the Commission to ignore the antitrust laws, but must estimate the scope and appraise the effects of curtailed competition which will result from the proposed acquisition and consider the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the overall transportation policy.

Section 3(5) of the Act provides in part:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including mainline track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced.

Also pertinent here is section 1(18) of the Act which provides in part:

After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line or railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

The evidence justifies authorization of the proposed control in Finance Docket No. 24679 conditioned upon inclusion and equal ownership by SP and Milwaukee and the intervening trackage access to Peninsula by the latter two carriers, as set forth in the findings, and the conclusion that such control is in the public interest and would promote a sound transportation system. The Port, Public Utility Commissioner of Oregon, Portland Commission of Public Docks, and some industry representatives which presented evidence support joint equal ownership by all the line-haul railroads serving Portland. Existing disparity in charges and treatment of traffic within the Portland switching area is convincing evidence that the greatest economic advantage for equality of shippers and carriers can be accomplished

best by equal access and ownership. The most economical and functionally modern transportation facilities are essential to development of Rivergate and the Port of Portland. Limitation of direct access there to two railroads barring on-line solicitation and the direct development interests of the other railroads serving the Portland area is contrary to an environment of unencumbered development and the establishment of a sound transportation system. Each of the four railroads which request equal ownership in Peninsula are class I railroads with ample financial means for ownership participation and the sharing of cost for future betterments. Moreover, direct access to all the carriers will enable shippers to deal directly with originating carriers providing on-line service to many points in areas not served by the two initial applicants. Shippers would benefit from elimination of switching charges assessed on non-competitive traffic where one of the applicants now acts as a switching carrier.

No particular finding or further consideration here respecting fixed charges is required, except to say that evidence relating to the proposals reflects no increases in, or guarantee, or assumption of fixed charges which would require statutory action.

With respect to protection of employees' interests, authorization of the control proposals no doubt would result in some employee readjustments. However, the evident immediate effects of the proposals upon employees are minimal, and normal attrition would tend to dissipate them. At most, the immediate result would involve reassignment of switching crews for about 1.5 cars daily moving through Albina Yard, because responsibility for the move under the proposals would shift from UP to SP. One labor organization represents, in absence of documentary or statistical

support, that a change in the interchange point, of through traffic, from East Portland to North Portland would reduce operation of the Portland Terminal Company by as much as 50 percent. Actually, whether traffic moves through Albina Yard or through the Portland Terminal Company Yard in route to or from North Portland is by railroad management prerogative exercisable through carrier agreement irrespective of a determination here. Even though the effects are minimal, employees of the involved railroads, nevertheless, will be affected by authorization of the proposals, and action here is subject to, at least, the bare requirements of section 5(2). As noted, certain carrier-employee labor agreements of the involved railroads exist, but participants in these proceedings espouse no new agreements wherein conditions have been prescribed or agreed upon by the parties as permitted by the last sentence in section 5(2)(f). However, the Brotherhood of Locomotive Engineers, on brief, request the imposition of conditions similar to those contained in an agreement dated June 25, 1965, signed by it, and The Great Northern Pacific & Burlington Lines, Inc., used as a basis for prescribing protective conditions in the *Great Northern Pac.—Merger—Great Northern, supra,* proceedings. Aside from the prescription of bare minimum protective conditions in this proceeding as imposed in *Chicago & N. W. Ry. Co. Merger,* 261 I.C.C. 672 at 675, more detailed conditions are deemed unnecessary and are not recommended. Actually, the evidence affords assurance of increases in involved traffic movements, if ample transportation is provided, which would result in substantial overall public and employment benefits.

Evidence relating to the SP applications, Finance Docket Nos. 24890 and 24891, warrants a conclusion that common use by SP of the terminal facilities, including trackage, of

UP between Peninsula, at North Portland Interchange tracks, and the SP-UP connection at East Portland is in the public interest, practicable, and would not substantially impair UP's ability to handle its own business. The issue affording the greatest contest here is whether traffic conditions over and along UP trackage between East Portland and North Portland warrant the proposed SP operation. The record reflects substantial traffic movements over the UP trackage with congestion over the single track from St. John's Tunnel and in and around Peninsula Junction. Noted, is the almost incredible 30-hour average transit time required for car movements between Albina Yard and Peninsula, a round trip distance of about 10.4 miles, including engine changes, car inspection, and car classification at Albina Yard, which UP considers reasonable. Despite the congestion, there are times during each day when the single-line track through the tunnel to North Portland is clear and could accommodate additional traffic. UP asserts it is capable of providing the public all the service it needs presently, or will require, in the involved area. With no immediate appreciable increase in the involved traffic, the examiner is convinced that a grant to SP of the trackage rights would result in no significant increase in congestion on the involved UP track segment, and the user carriers through their joint efforts would be in a better position to overcome future traffic impediments as they occur. Actually, with SP cars being classified and inspected at Brooklyn Yard or Eugene, before movement by SP under the proposal directly through Albina Yard to North Portland and return in about 3.5 hours, no more and possibly less congestion should occur than at present. While UP has endeavored to relieve congestion in the Albina Yard area through various devices, the 30-hour transit time

remains unsatisfactory, and greater efforts in the public interest must be found to expedite movements between those points. With the development of Rivergate and the requirements for substantial movements of traffic, including unit trains, to and from that area the examiner is convinced that access thereto by other line-haul carriers will create greater incentive for improvement of railroad facilities and for elimination of present unsatisfactory conditions in the involved area. Rather than perpetuate the existing unsatisfactory conditions, the advent of other carriers, the advent of other carriers would at least supply added carrier financial support and responsibility greatly favoring the public interest.

As noted, cost studies of both SP and UP introduced in evidence reflect great variance in the net effect of operations over the Albina-North Portland track segment involved here. The studies are significant only to the extent that they bear on the issue of public interest, and to the extent that they may affect compensation which might be paid UP for use of its involved trackage. The probative effect of the studies upon public interest is questionable because of variables in judgment and calculations used, or which might be used, in their preparation. Of interest, is the study basis of SP for determining compensation for use, that is, the relation which actual trackage use bears to total use by all users, compared to the basis used in the UP study, generally the payment in relation to the number of users irrespective of extent of use by any of the carriers. In this connection, the examiner observes that while the application in Finance Docket No. 24890, in part, contains a request for "bridge trackage rights" the application in Finance Docket No. 24891 specifies no particular type of trackage rights sought. In the best public interest any

authorization of proposed trackage rights should permit full user rights, with the attending assumption by the recipient thereof of entire use and responsibility and the payment of compensation therefor on a numerical basis. However, the amount of compensation for use of trackage rights recommended herein, is left to agreement by the involved carriers. Section 3(5) clearly reveals that after the right of a petitioner to use the terminal facilities of another carrier has been determined, the interested carriers shall have an opportunity to agree upon the terms and compensation for such use. In event of failure of the carriers to agree, they may petition the Commission to reopen the proceeding for further hearing for determination and prescription of terms and compensation. Jurisdiction will be retained for such purpose. See *Missouri - K. - T. - Ry. Co. v. Kansas City Terminal Co., supra* and *Use of Erie of Niagara Junction Ry. Co. Terminals,* 269 I.C.C. 493, 499.

Authorization of joint ownership and access by the four line-haul railroads in Peninsula, and the proposed trackage rights to SP would not curtail competition. To the contrary, shippers in the involved area would be afforded free direct access to all the line-haul carriers' services. Among other things, it would place traffic movements between the Portland area, on the one hand, and, on the other, on-line points of carriers in California and States east thereof, on a more competitive basis with movements between those points over the lines of UP and GN and their connections, through Wishram, Wash., Bend and Chemult, Oreg., and Bieber and Sacramento, Calif. Also, Milwaukee would become more competitive with UP and GN and their connections in providing service to the north and east of Portland. The authorizations, generally, would result in improved competitive service and the fostering of sound transportation in the involved area.

UP asserts on brief that extension of service by SP and Milwaukee as requested cannot be approved under section 3(5) or section 5(2) because the service each seeks to perform requires a finding that the present and future public convenience and necessity require extensions of their operations into the involved territory pursuant to section 1(18) of the Act. SP is certificated to operate from points south of Portland to East Portland, within the Portland Switching District, from which it serves, and has served, Portland through connections for many years. The Commission has ample power under section 3(5) to require use by SP of the involved UP terminal facilities and use of Peninsula facilities. However, the Comissimon has authority under section 5(2) upon petition by a carrier as prerequisite to approval of a proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved. This section contains authority for the inclusion of SP upon equal terms in the Peninsula purchase, for SP is a railroad "in the territory" providing service in the Portland area. Further certification of SP under section 1(18), aside from possible authorization of user rights under section 3(5), to operate to and from Peninsula, in the circumstances, is not required. The powers conferred by sections 3(5) and 5(2), collectively, provide ample authorization to permit that transportation which in the Commission's judgment, is best suited to public needs. As noted, Milwaukee's request for inclusion as an equal owner in Peninsula and the right of access thereto depends upon termination of litigation and consummation of the merger authorized by the Commission in *Great Northern Pac.—Merger—Great Northern, supra,* wherein Milwaukee, as pertinent, was granted trackage rights between Longview Junction and Portland, a distance of about 46 miles.

After consummation, Milwaukee will acquire trackage rights to enable operations between Longview Junction and Portland over the main line tracks of SP&S and SP including connection with the North Portland interchange tracks. Authority of the Commission in the granting of such trackage rights to Milwaukee in order to preserve the competitive conditions in the involved territory is not questioned. Whether such grant is sufficient to create another railroad in the Portland area within the meaning of section 5(2) without the further procuring of a certificate under section 1(18) is subject to question, for the Longview-Portland track is not part of a terminal facility and the trackage rights over this track segment actually create no certificated authority. However, the evidence adduced in the *Great Northern Pac.—Merger—Great Northern case* affords ample justification for issuance of such a certificate without further hearing, upon petition therefore. In view of the pendency of the described case, the examiner recommends authorization of control on an equal ownership basis by SP&S, UP, and SP on Peninsula with access thereto, subject to sale (upon consummation of the merger in the *Great Northern Pac.—Merger—Great Northern* proceeding) by those three carriers to Milwaukee of a one-fourth equal interest in Peninsula, including access trackage rights thereto. In event the parties elect not to consummate the purchase recommended herein further petitions by these carriers requesting access to and operation over trackage of Peninsula pursuant to section 3(5) of the Act may be filed. Jurisdiction will be retained for that purpose.

ULTIMATE FINDINGS AND ORDERS

In Finance Docket No. 24679 and in the related petitions dated August 23 and November 29, 1967, upon consideration

of all evidence of record, the examiner finds (1) that control of Peninsula Terminal Company by Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company, and the inclusion of Southern Pacific Company in such control, through purchase of all outstanding stock of Peninsula Terminal Company in equal shares and the additional equal contribution by each for payment of an unsecured $70,000 locomotive equipment open account owed by Peninsula Terminal Company to Union Stockyard Corporation, subject to sale by each, Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Southern Pacific Company, of a one-twelfth interest in Peninsula Terminal Company, including pro rate contribution for the locomotive equipment, to Chicago, Milwaukee, St. Paul and Pacific Railroad Company, conditioned (a) upon consummation of the merger transaction in the *Great Northern Pac.—Merger—Great Northern proceeding,* 331 I.C.C. 869, and (b) upon the filing by Chicago, St. Paul and Pacific Railroad Company of a request for certificate of convenience and necessity authorizing railroad operation between Longview Junction, Wash., and Portland, Oreg., upon the terms and conditions set forth herein, are just and reasonable, constituting a transaction within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent with the public interest, and (2) that the right of access by Southern Pacific Company and Chicago, St. Paul & Pacific Railroad Company, upon consummation of the transaction described in (1) above by one or both of these carriers, to Peninsula Terminal Company trackage over intervening North Portland interchange tracks, at North Portland, Oreg., presently owned individually or jointly by Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company,

Union Pacific Railroad Company, and Northern Pacific Railway Company, upon such terms and compensation for use of such intervening trackage mutually agreeable to the interested carriers, or in the event of failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act, such compensation to be paid or adequately secured before enjoyment of use thereof may be commenced, would be in the public interest, that operation pursuant to such right of access is practicable and would not substantially impair the ability of the owning carriers to handle their business; and that the application and petitions in all other respects should be denied.

In Finance Dockets No. 24890 and No. 24891, the examiner finds that common use by Southern Pacific Company of the railroad tracks and facilities of Union Pacific Railroad Company for operation between the Union Pacific Railroad Company-Southern Pacific Company track connection at East Portland, Oreg., and tracks of Peninsula Terminal Company at North Portland, Oreg., through Albina Yard, and Peninsula Junction, conditioned upon such terms and such compensation as Union Pacific Railroad Company and Southern Pacific Company may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act, such compensation to be paid or adequately secured before the enjoyment of use thereof may be commenced, would be in the public interest; that such operation is practicable and would not substantially impair the ability of Union Pacific Railroad Company to handle its business, and that the applications in all other respects should be denied.

In each of the proceedings the examiner further finds as a condition to the transactions authorized therein, that

during the period of 4 years from the effective date of the orders herein such transactions will not result in employees of the carrier or carriers by railroad affected by such orders being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such orders, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

ORDER

Premises considered, it is the ORDER of the hearing examiner in Finance Docket No. 24679, Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company—Control—Peninsula Terminal Company, in the petition of Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed August 23, 1967, and in the amended petition of Southern Pacific Company, filed November 29, 1967, that:

Acquisition of an equal interest by each, Spokane, Portland & Seattle Railway Company and Union Pacific Railroad Company, and the inclusion therein of Southern Pacific Company, of control of Peninsula Terminal Company, through purchase of the outstanding stock, and the sale by each of a one-twelfth interest in Peninsula Terminal Company to Chicago, St. Paul & Pacific Railroad Company, upon, and in event of, subsequent conditions be, and it is hereby, approved and authorized, subject to conditions set forth in the findings, and the application and petitions in all other respects are hereby, denied.

The authority to control, approved herein, may be exercised by Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Southern Pacific

independently of Chicago, St. Paul & Pacific Railroad Company, and if exercised, the first three named carriers shall submit for consideration and approval of this Commission three copies of the journal entries required to record the transaction.

In event subsequent conditions as set forth in the findings permit exercise of the authority herein, and such authority is exercised, by Chicago, St. Paul & Pacific Railroad Company, this carrier shall submit for consideration and approval of this Commission three copies of the journal entries required to record the transaction.

The right of access by one or both of Southern Pacific Company and Chicago, St. Paul & Pacific Railroad Company, upon consummation of the transaction described immediately above, to Peninsula Terminal Company over intervening North Portland interchange tracks of Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company, and Northern Pacific Railway Company as described in the findings herein, be, and it is hereby, approved and authorized subject to the conditions set forth in the findings and orders.

Within 90 days from the effective date of this order, Southern Pacific Railroad Company, Peninsula Terminal Company, Spokane, Portland & Seattle Railway Company, and Northern Pacific Railway Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the use of North Portland interchange trackage, with provisions for possible inclusion of Chicago, St. Paul & Pacific Railroad Company in such agreement within 1 year from the effective date of this order, and in event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

Northern Pacific Railway Company, one of the owners of Spokane, Portland & Seattle Railway Company, be, and it is hereby declared to be a party to these proceedings for the purpose of participation in trackage agreements described in this order.

The authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 1 year from the date of such notice or order, or within any extension thereafter ordered by the Commission, this order shall be of no further force and effect.

The jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 2 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate.

The recital of balance sheet and other financial data shall not be construed as approval of accounting methods which have been followed, or expenditures represented thereby.

By the Commission, Samuel C. Shoup, Hearing Examiner.

Dated at Washington, D. C., this 9th day of September, A. D. 1968.

(SEAL)

H. NEIL GARSON,

Secretary

ORDER

Premises considered, it is the ORDER of the hearing examiner in Finance Docket No. 24890, Southern Pacific Co.—Common Use of Terminal Facilities—Peninsula Ter-

minal Co., and in Finance Docket No. 24891, Common Use of Certain Terminal Facilities—Union Pacific Co., that the request therein for common use by Southern Pacific Company of the railroad, tracks and facilities of Union Pacific Railroad Company as described in the findings herein, be, and it is hereby, approved and authorized subject to the conditions set forth in the findings and order herein; and that the applications in all other respects are denied.

Within 90 days from the effective date of this order the Union Pacific Railroad Company and the Southern Pacific Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the use of tracks and terminal facilities herein authorized; and in event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

The authority herein granted shall not be exercised prior to the date of service of the order adopting this recommendation as the order of the Commission, or of a notice stating that this recommended order has become the order of the Commission.

The jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 2 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate.

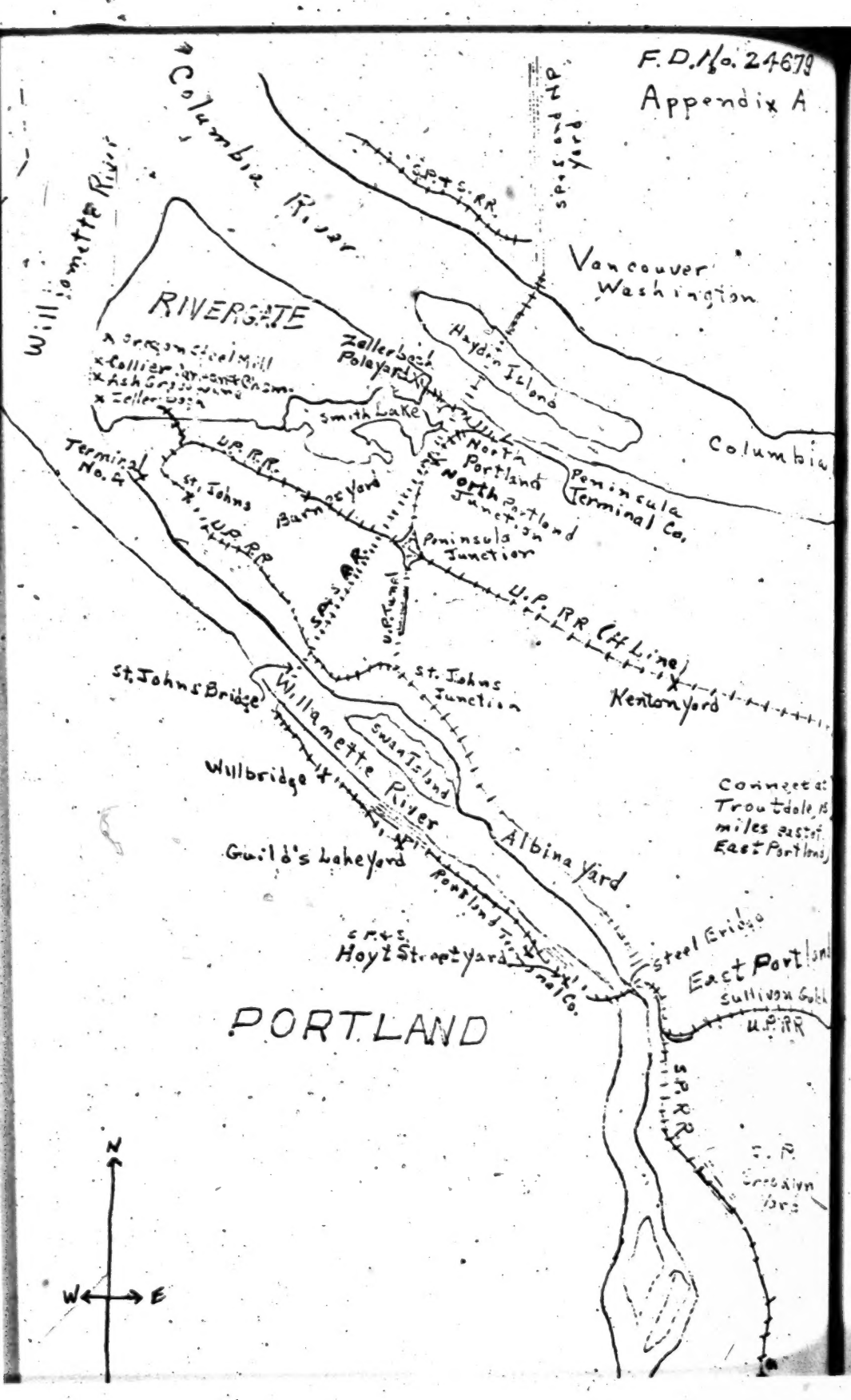
By the Commission, Samuel C. Shoup, Hearing Examiner.

Dated at Washington, D. C., this 9th day of September, A. D. 1968.

(SEAL)

H. NEIL GARSON,

Secretary


F.D. No. 24679
Appendix A
Columbia River
Willamette River
G.P.T.S.RR.
Vancouver Washington
RIVERGATE
Oregon Steel Mill
Collier
Ash Grove Cement Chem.
Zellerbach
Zellerbach Polayard
Hayden Island
Smith Lake
Columbia
Terminal No. 4
U.P.R.R.
St. Johns Barn & yard
North Portland Junction
Peninsula Terminal Co.
Peninsula Junction
U.P. RR CH Line
St. Johns Bridge
St. Johns Junction
Kenton yard
Willamette River
Swan Island
Albina Yard
Guild's Lake yard
Portland Terminal Co.
Hoyt St. yard
Steel Bridge
East Portland
Sullivan Gulch
PORTLAND
N
W
E

Appendix F

Endorsed:
Filed Sept. 1, 1970
George E. Juba, Clerk
By M. Hartzell
Deputy

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In The United States District Court
For the District of Oregon
Civil Action No. 69-696

Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Commission of Public Docks of the City of Portland, Oregon

Plaintiffs,

v.

The United States of America and Interstate Commerce Commission,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Port of Portland, Sam R. Haley, Public Utility Commissioner of Oregon, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Southern Pacific Transportation Company, plaintiffs, hereby appeal to the Supreme Court of the United States from the order and judgment dismissing the complaint, entered in this action of July 9, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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By W. Harney Wilson

CERTIFICATE OF SERVICE

I, W. HARNEY WILSON, the attorney for plaintiff Southern Pacific Transportation Company, hereby certify that on this first day of September 1970, I served a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States by mailing the same in an envelope duly addressed with airmail postage prepaid to the following:

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Appendix G

National Transportation Policy

[49 U.S.C., preceding §§ 1, 301, 901, and 1001].

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

§ 3, par. 5. Terminal facilities; use of and compensation for. If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier

or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

* * * * *

§ 5, par. (2). Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merger their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a

carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad

subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * * * *

§ 5, par. (11). Plenary nature of authority under section. The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent,

in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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No. ~~888~~ 70-31

In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 903

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MEMORANDUM FOR THE UNITED STATES

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A), affirming without opinion the report and orders of the Interstate Commerce Commission (J.S. App. B, C, and D) granting the application of the appellee railroads. Although statutory defendant below,[1] the United States agreed with the plaintiffs (appellants here) that the Commission erred in its challenged decision. For reasons hereinafter detailed, the United States agrees with the appellants that substantial questions affecting the continued viability of rail competition in the Pacific Northwest and the proper administration of the Interstate Commerce Act warrant this Court's plenary review of this case.

[1] 28 U.S.C. 2322.

STATEMENT

At issue in this proceeding is the joint acquisition and control of Peninsula Terminal Company, an independent switching railroad, by two of the four line-haul railroads now authorized to serve Portland, Oregon, directly. Current interest in Peninsula stems from its proximity to the eastern border of the Rivergate Industrial District, a 2,942 acre port and industrial complex owned and under development by the Port of Portland. The Rivergate complex is strategically situated at the confluence of the Columbia and Willamette Rivers (J.S. App. B–4, B–5), and it is estimated without challenge that the ultimate public and private investment there will exceed 500 million dollars. Rail traffic generated by Rivergate industries is expected to reach, at full development, between 500 and 600 cars per day, with an annual volume of five million tons of freight (J.S. App. B–47).

Peninsula's tracks provide one of two rail access routes to Rivergate. Barnes Yard, the other point of access, is owned by the Union Pacific Railway Company. These two access terminals are connected by tracks owned jointly by the Union Pacific and the Spokane, Portland & Seattle Railway Company ("SP&S") (J.S. App., B–38), which are also the only rail carriers whose tracks now connect with those of Peninsula.[2] The present litigation arises out of

[2] A map is set forth following J.S. App. E–65. The SP&S is now a subsidiary of Great Northern Pacific & Burlington Lines, Inc. ("Burlington Northern"), the new company formed by the merger of the Great Northern Railway Company and the Northern Pacific Railway Company, approved by this Court

the joint application of the SP&S and Union Pacific, filed on July 25, 1967, seeking Commission approval under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), of a joint acquisition of control of Peninsula.

In response to the application, the two other trunk-line railroads serving Portland, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Southern Pacific Transportation Company—filed petitions seeking inclusion as joint and equal owners of Peninsula (under Section 5(2)(b), (c) and (d), 49 U.S.C. 5(2)(b), (c) and (d)) and the right to use tracks necessary to connect their own lines with Peninsula's tracks (under Section 3(5), 49 U.S.C. 3(5)). After a full administrative hearing, the Commission's hearing examiner approved the proposed acquisition, conditioned upon the inclusion of the Milwaukee and Southern Pacific as equal owners, and granted the related trackage rights sought by those carriers (J.S. App. E). However, upon exceptions by the SP&S and Union Pacific, the Commission (Division 3) authorized the acquisition without these conditions, thus giving SP&S and Union Pacific the sole right to use the Peninsula access to Rivergate (J.S. App. B).

The decision was challenged in the court below by the Port of Portland and the Public Utility Commis-

---

last Term in the *Northern Lines Merger Cases*, 396 U.S. 491. As an aspect of that merger, the SP&S was permitted to lease its properties to Burlington Northern, so that it operates as an integral part of Burlington Northern. Prior to the merger, the SP&S was jointly owned by the Northern Lines.

sioner of Oregon,[3] later joined by appellants the Milwaukee and Southern Pacific. The United States filed an answer supporting the plaintiffs. The district court dismissed the complaints, without opinion, in an Order and Judgment dated July 9, 1970 (J.S. App. A). This appeal followed.[4]

DISCUSSION

1. As we have pointed out, the SP&S is an integral part of the rail system of the powerful Northern Lines, now merged to constitute the Burlington Northern by reason of this Court's decision a year ago in the *Northern Lines Merger Cases* (see *supra*, p. 2, n. 2). The competitive position of the Milwaukee (one of the petitioners here for rights in the Peninsula trackage) was—as the Court's opinion in *Northern Lines* reflects, 396 U.S. at 496–497, 500, 514–516—a central element in the administrative and judicial proceedings which ultimately resulted in that merger. Initially, the Commission disapproved the merger, in substantial measure because of the adverse impact it would have upon the relatively weak Milwaukee, the only source of competition for the dominant Northern Lines across the Northern tier of states. *Great Northern Pacific & Burlington Lines,*

[3] The Port of Portland and the Public Utility Commissioner of Oregon, among others, had intervened in the Commission proceedings in support of the joint ownership of Peninsula by the four involved railroads.

[4] Following commencement of the district court proceedings, the Commission entered an order on December 8, 1969, postponing the effective date of its earlier order until further order of the Commission.

Inc., Merger—Great Northern, 328 I.C.C. 460 (1966). When the Commission subsequently decided to approve the creation of Burlington Northern on reconsideration, a fundamental justification for its change of position was the merger parties' agreement to protective conditions, by which the Commission found that the Milwaukee "will be substantially strengthened as a meaningful transcontinental competitor" of the merged Great Northern and Northern Pacific. 331 I.C.C. 228, 271–273 (1967); see 396 U.S. at 516.

The principal condition to the Northern Lines merger intended to strengthen the Milwaukee is Condition 24(a), which for the first time granted the Milwaukee direct access into the Portland area. This Condition, whose adoption was anticipated in the Milwaukee's petition for inclusion in the Peninsula acquisition provides in part:

> Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of [Burlington Northern] between Longview Junction, Wash., and Portland, Oreg., [Burlington Northern] shall grant to the Milwaukee * * * trackage rights to operate freight trains over [Burlington Northern] lines between Longview Junction and Portland, *including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of [Burlington Northern] facilities at Portland necessary for the switching of traffic to other railroads and industries.* [331 I.C.C. 228, 357, Appendix L; emphasis added].[5]

[5] The condition is set forth in full at J.S. App. B–13, n. 5.

This condition was of major importance because, as this Court noted, the Milwaukee's "past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon * * *." 396 U.S. at 515. The Commission emphasized that this condition would permit the Milwaukee "to solicit additional traffic, and to enter into heretofore inaccessible markets" in Portland. 331 I.C.C. at 276.

It is axiomatic that the promise of the Northern Lines merger to make the Milwaukee a "meaningful competitor" for the vital long-haul traffic between Portland and the Northern tier cannot be fulfilled unless the Milwaukee is given direct and unconditional access to terminal facilities at Portland; a terminal carrier has long been recognized as possessing an inherent advantage in obtaining the line-haul traffic of area industries. *St. Louis Southwestern Railway Co., et al.—Purchase—Alton & Southern Railroad*, 331 I.C.C. 515, 534; *Norfolk and Western Railway Company—Control—FP&E Company—Purchase—Fairport, Painesville and Eastern Railroad Company*, 330 I.C.C. 672, 680; *Control of Central California Traction Company*, 131 I.C.C. 125, 135–136.[6] Nonetheless, the Commission has here effectively denied the Milwaukee equal access to the one neutral terminal facil-

[6] Indeed, in the instant case, the Commission examiner found that "* * * a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching carrier has the solicitation advantage." J.S. App., E–16—E–17.

ity remaining in Portland and, what is of greater long run significance, the opportunity to meaningfully compete for the substantial line-haul rail traffic which is projected to develop in the strategic Rivergate district.

The Commission's refusal to give effect to the Portland condition in Milwaukee's favor in the present case was explained as follows:

> Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to Northern Lines trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by the Commission. [J.S. App., B–19.]

Presumably, then, the Commission would have effectuated the Condition here but for the fact that Burlington Northern joined Union Pacific with it in its takeover of Peninsula. Allowing the Burlington Northern thus to evade this obligation is, we submit, arbitrarily to abrogate a fundamental element of the Commission's order approving that merger. We fail to understand why Burlington Northern must be allowed to do jointly what it could not do alone.

The Commission was in any event incorrect in suggesting that Union Pacific's interests could not appropriately be affected by a condition imposed in the

Northern Lines merger proceedings.[7] In fact, although not a party there, the Union Pacific presented in great detail its position regarding the entry of the Milwaukee into Portland. 331 I.C.C. 282–283. Having considered the Union Pacific's contentions, the Commission concluded that the public interest in having the Milwaukee enter all Northern Lines markets on an equal competitive basis outweighed the Union Pacific's asserted injury, particularly since "the addition of the Milwaukee as a competitor at Portland would be somewhat offset by the elimination of Northern Pacific and Great Northern as separate competitors." *Id.*

To be sure, the Commission could not divine in the Northern Lines proceedings every situation to which Condition 24(a) might be applied. Yet the Commission there recognized "its broad and flexible power" when considering Section 5(2) applications to determine the modifications and conditions necessary to protect the public interest. 331 I.C.C. at 286. See *Penn-Central Merger and N&W. Inclusion Cases,* 389 U.S. 486, 496. If, when now presented with a Section 5(2) application, the Commission can successfully claim that its

[7] The Union Pacific shares with Peninsula and SP&S joint ownership of a minority interest in the interchange tracks connecting the SP&S main line with Peninsula, J.S. App. B–31—B–33. But there was no evidence regarding the nature of the Union Pacific interest, or that its interest in any way precluded the Northern Lines and Peninsula, the other owners, from granting the Milwaukee usage rights over the interchange trackage. Further, by acquiring joint ownership of Peninsula, the Milwaukee would succeed to the ownership interests possessed by Peninsula in the interchange tracks, which would place it on an equal basis with the Union Pacific with respect to use of the involved trackage.

power is not sufficiently "broad and flexible" to prevent the Burlington Northern from flouting the conditions by which its very existence as a merged carrier purported to be justified, the premises upon which this Court decided the *Northern Lines* case will be largely nullified. Accordingly, we submit that the Commission's refusal to implement the condition as to the Milwaukee was arbitrary and not rationally supportable by the reasons it has given.

2. More generally, the Commission inadequately analyzed the competitive factors it was required to consider in determining whether unconditioned acquisition of Peninsula by Burlington Northern and Union Pacific comports with the public interest, even without regard to Milwaukee's special rights under the *Northern Lines* condition. And it went on to base its decision on erroneous legal standards.

As relevant to Section 5(2) transactions, the test of whether a planned merger or acquistion of control is "consistent with the public interest" is whether the proposal will promote "adequate, economical, and efficient service" and "sound economic conditions in transportation." National Transportation Policy, 49 U.S.C. preceding Section 1. It is well settled that the Commission is required to weigh anticompetitive effects in determining whether Section 5(2) applications satisfy the public interest standard. See *Denver & Rio Grande Western Railroad Co.* v. *United States*, 387 U.S. 485, 492–494; *Baltimore & Ohio Railroad Co.* v. *United States*, 386 U.S. 372, 401–404 (Mr. Justice Brennan concurring). As recently restated in *Northern Lines*, "* * * the Commission must also

consider the anticompetitive effects of any merger or consolidation, because under § 5(11) of the Interstate Commerce Act any transaction approved by the Commission is relieved of the operation of the antitrust laws. *McLean Trucking Company* v. *United States*, 321 U.S. 67, 83–87 (1944)." 396 U.S. at 504. And while the Commission need not follow the identical analysis, or make the same findings, as would be required in an antitrust suit, *Seaboard Air Line Railroad Company* v. *United States*, 382 U.S. 154, 156–157, the Commission's failure adequately to consider the anticompetitive effects of an acquisition on competing lines constitutes reversible error. See *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 961 (C.A.D.C.).

In the instant case, the Commission looked no further than the competitive impact of the inclusion of the Milwaukee and Southern Pacific on the joint applicants' already substantial dominance of the Rivergate market area. It did not consider the impact the exclusive control it was assuring the applicants over both rail gateways to that market would have on the Milwaukee and the Southern Pacific, and on the shipping public's present and future interest in multi-line service there. No mention was made by the Commission of the existing marginal competitive significance of the Milwaukee recognized by this Court in *Northern Lines*, 396 U.S. at 491. Nor was attention given to the effect on the Southern Pacific's ability to serve adequately and efficiently its markets in the Southwestern States. There was little discussion of the comparative benefits to shippers of multi-line service. Thus, the

Commission did not balance the adverse competitive effects that its unconditioned grant of the application would have, and so did not fulfill the obligation imposed on it by the foregoing decisions.

Further, the Commission erred in its determination that participation in Peninsula's control by the Milwaukee and Southern Pacific, "would constitute a new operation and an invasion of the joint applicant's territory" (J.S. App. B–20). There is no authority for the proposition that railroads which connect with an independent switching carrier (Peninsula) thereby acquire the exclusive right to serve the independent carrier's industries. To the extent that such territorialization has any validity, those industries are within the Port of Portland's territory, for it is the Port which is developing the interior lines with which Peninsula will connect. Thus, the inclusion of the Milwaukee and Southern Pacific does not constitute "an invasion" of SP&S (Burlington Northern) and Union Pacific territory. On the contrary, the exclusive control of Peninsula newly granted the two giants will enable them to block the other carriers from direct access.

As authority for this concept of "territorial exclusivity," the Commission relies upon *Minneapolis, St. P. & S.S.M.R. Co. Acquisition,* 295 I.C.C. 787, 802 (J.S. App., B–21). But, if anything, that decision underscores the fallacy of the Commission's reasoning here. There, the Commission denied applications of other lines to extend their operations into territory traditionally served on a direct basis by the North Western because the North Western's economic

vulnerability made preservation of its exclusive territory important to the public interest. 295 I.C.C. at 798. In the instant case the positions of the parties are precisely reversed. The joint applicants were financially secure rail carriers, as found in the *Northern Lines* case (328 I.C.C. at 471; 331 I.C.C. at 282–283), while the Milwaukee was a weak line whose service to the Pacific Northwest required protection (331 I.C.C. at 271; 396 U.S. at 515). By a parity of reasoning, the *Minneapolis* case supports the conclusion that the acquisition of exclusive control of the Rivergate market by the two strongest rail carriers, to the detriment of a financially weak competitor, would not be in the public interest. Moreover, given the strength of Burlington Northern and the Union Pacific, the counterbalancing strength of the Southern Pacific would spur them to better service.

It is noteworthy that the Commission did not find that the Rivergate market was not sufficiently large to support the operations of the four rail carriers. It merely stated that inclusion of the Milwaukee and Southern Pacific would have an "adverse effect" on the joint applicants who already directly serve Rivergate industries. That amounts to a conclusion that Burlington Northern and Union Pacific have a legal right to exclusive occupancy of the market. Not only is this not the law, *Chesapeake & Ohio Railway Company Construction,* 267 I.C.C. 665, 679, but its application here would be particularly detrimental to the development of public industrial facilities served by one of several competing rail carriers. *Illinois Central Railroad Company et al. Construction and Track-*

age Rights, Lake Calumet Harbor, Cook County, Ill., 307 I.C.C. 493, 528, *aff'd sub nom., Illinois Central Railroad Co.* v. *Norfolk and Western Railway Co.*, 385 U.S. 57.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

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PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA; ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 903

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A) affirming an order of the Interstate Commerce Commission (J.S. App. B) which authorized the Spokane, Portland & Seattle Railway Co. (SP&S)—now part of Burlington Northern [1]—and the Union Pacific Rail-

[1] SP&S, formerly owned by Great Northern and Northern Pacific, is now a subsidiary of Burlington Northern, Inc. See *Northern Lines Merger Cases*, 396 U.S. 491.

road Co. (UP) to control the Peninsula Terminal Co. (Peninsula), a small terminal switching road whose tracks connect only with SP&S and UP. Two other railroads, the Chicago, Milwaukee, St. Paul and Pacific (Milwaukee) and the Southern Pacific (SP) unsuccessfully sought inclusion in the transaction.

Peninsula presently serves 14 industries along its tracks, and over 80% of its line-haul traffic is already handled by UP and Burlington Northern (J.S. App. B–4—B–5, B–21; Exh. 28, pp. 5–6). Peninsula's tracks run to the edge of a largely undeveloped tract known as Rivergate, and presently ends several miles from five of the six industries located there (J.S. App. B–4, B–5, B–53—B–55; Tr. 302, 378, 606–609; Exhs. 5A, 6). The Port of Portland, which owns Rivergate, hopes some day to develop it fully. If this materializes, there would be a need for rail service to whatever industries may locate there. Should that contingency occur, service could be furnished either by extension from the present SP&S line located near Rivergate or—if problems of heavy curvature, impaired clearance, and low standard tracks could be surmounted—by an extension of Peninsula's line (J.S. App. B–5, B–36—B–37).

In this proceeding, SP&S and UP sought authority to acquire stock control of Peninsula. Milwaukee sought inclusion in the transaction, requesting authority to purchase a one-third share of Peninsula. To reach Peninsula's tracks physically, Milwaukee also requested trackage rights, over other tracks presently owned by SP&S, UP, and Peninsula. South-

ern Pacific also sought inclusion in the transaction and trackage rights. After a full hearing, in which appellants participated, the hearing examiner recommended joint acquisition of Peninsula by all four carriers and approval of concomitant trackage rights. Upon exceptions, however, the Commission (Division 3) concluded that the acquisition only by UP and SP&S should be approved.

Milwaukee claimed the right to own part of Peninsula because of a condition in the Northern Lines merger effectively extending its lines to Portland. See *Northern Lines Merger Cases, supra,* 396 U.S. at 515–516. Noting that Milwaukee could seek relief in the merger proceeding itself (J.S. App. B–19)—a course which the carrier has never taken—the Commission concluded that the condition as presently drawn did not *ipso facto* entitle Milwaukee to buy into Peninsula. Reasoning that the merger condition applied only to trackage owned solely by the Northern Lines, who had agreed with Milwaukee as to its imposition long before the present application was filed, the Commission concluded that Milwaukee's petition could not "be considered to implement that condition" and must, like that of SP, be judged on its own merits. (J.S. App. B–19.)

As to the merits, the Commission, disagreeing with the examiner's approach, found that "the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area" did not "give them the right to serve all industries anywhere within that undefined geographical area" (J.S. App. B–20).

Focusing instead upon Peninsula and Rivergate, the agency reasoned that direct service to Peninsula's industries by SP and Milwaukee, over objections of roads currently there, would constitute "a new operation and an invasion of the joint applicants' territory." (J.S. App. B–20.) Finding that the record failed to establish that UP and SP&S, through control of Peninsula, could not handle present and future traffic in the Peninsula territory adequately, efficiently, and economically (J.S. App. B–23), the Commission concluded that the "adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership" (J.S. App. B–23). The Commission accordingly approved acquisition of Peninsula by SP&S and UP, subject to conditions to protect the traffic of other railroads (J.S. App. B–25–26).

Because of the instant litigation, the effective date of the order was subsequently postponed. In the court below, as here, the United States, through the Department of Justice, urged that the Commission's decision be set aside. By order and judgment of July 9, 1970, the district court dismissed the action, finding, without opinion, that the Commission's decision was supported by substantial evidence and was neither arbitrary nor capricious (J.S. App. A).

ARGUMENT

The case presents no issue warranting plenary consideration by this Court. Some of the questions—involving claims that Milwaukee has been permanently denied access to a new industrial area, contrary to the thrust of the Northern Lines merger—are simply not present on this record. The remaining questions merely invite review of substantial evidence questions, as applied to familiar legal rules.

1. The Department is premature in contending that the Commission's action here has undercut the premises upon which the Northern Lines merger was approved. Indeed, despite the Commission's suggestion (J.S. App. B-19, fn. 10), Milwaukee has not yet even attempted to develop the matter within the merger proceeding itself. All that the Commission has here decided is that the merger condition, granting Milwaukee access to Portland, does not by its present terms confer on Milwaukee a right to participation in the control of Peninsula. The Commission explicitly recognized Milwaukee's right to seek relief in the merger proceeding itself (Ibid). This could readily be done by requesting modification of the prior condition or imposition of a new one. There it will be open to Milwaukee to press for access to Rivergate (or other points) on the grounds of competitive conditions arising out of the merger. Only then will Milwaukee's entitlement to relief in the context of merger considerations be fully developed for decision by the agency.

The Commission was plainly within its discretion in concluding that further relief as to merger conditions should be explored in the merger case, where many more parties would be present and where competitive and other considerations could be broadly examined. As the Commission explained here, "* * * this case cannot be viewed as part of the general realignment of western railroad competition resulting from" the merger (J.S. App. B-19). Moreover *Northern Lines* was still pending before this Court when the instant case was decided. Since the Commission had broadly retained jurisdiction to impose further conditions in *Northern Lines*, there was clearly no need to embark here upon a possible modification of conditions in a merger seriously challenged before this Court. In addition, the potential Rivergate traffic, emphasized by the United States, has not yet materialized, and indeed there are as yet no tracks connecting Peninsula to the proposed Rivergate industrial sites. And in view of the traffic conditions imposed here, and assurances made by SP&S and UP (Exh. 29, pp. 2–3; Exh. 28, p. 6), there is nothing to preclude Milwaukee's and SP's participation in such Rivergate traffic as might eventually develop. In these circumstances, the Commission's decision to "take one step at a time" (*New York* v. *United States*, 331 U.S. 284, 343) was well within its discretion.

2. The remaining contentions present nothing warranting further review and are, in any event, without merit.

a. Arguments as to the primacy of competition in proceedings under Section 5 of the Interstate Commerce Act (Memo. for U.S., pp. 9–11) have been

unsuccessfully urged upon this Court from *McLean Trucking Co.* v. *United States*, 321 U.S. 67 to *Northern Lines Merger Cases, supra*. There is nothing in the present case warranting re-examination of the settled rules that promotion of competition, though a consideration, need not control the Commission's exercise of discretion. *E.g., Northern Lines, supra*, 396 U.S. at 513–514. Similarly it is settled that the resolution of such matters is for the Commission, particularly where, as here, rival applicants seek to control another railroad. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 187–189. Nor was the Commission required to "project an analysis" of the competitive situation after SP&S and UP take over Peninsula. *Northern Lines, supra*, 396 U.S. at 516. And this was particularly so because, as we have shown, the order at bar does not forever foreclose Milwaukee's effort.

b. The principle that "a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized" (J.S. App. B–21) is also merely an application of settled law. "[E]conomy and efficiency in rail operations" (*Northern Lines, supra*, 396 U.S. at 508) is a basic purpose of the Interstate Commerce Act, and the "invasion through new construction of territory adequately served by another carrier * * * may be inimical to the national interest" (*Texas & Pac. Ry.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 278). A

carrier already-serving a territory has "the right not to be subjected to such new competition unless it is found to be in the public interest" (*St. Louis SW Ry.* v. *Missouri Pac. R. Co.*, 289 U.S. 76, 82). These considerations may be especially meaningful in view of current general railroad conditions. Here the Commission found that the Peninsula territory can be adequately served by SP&S and UP, which presently connect with Peninsula and handle the bulk of its traffic, and that "admitting SP and Milwaukee into membership and control of Peninsula" would have an "adverse effect on SP&S and UP, and the shippers dependent upon them for service" (J.S. App. B–23). That conclusion represents merely an application of settled principles to particular facts and presents no issue warranting review by this Court.[2]

c. Appellants' remaining contentions constitute nothing more than an attack upon the Commission's evaluation of the evidence. The face of the Commission's report reveals that it gave full consideration to both the present Peninsula and Rivergate traffic and the possible future traffic which might be generated by Rivergate if it is ever fully developed (J.S. App. B–21—B–23, B–47—B–55). Its conclusion that both the "present and future traffic" can be handled

[2]Appellants' reliance upon Section 3(5) of the Act produces no different result. Their failure to prove that inclusion in the Peninsula transaction was consistent with the public interest under Section 5 also amounts to a failure of proof under Section 3(5). Compare *Transit Commission* v. *United States*, 289 U.S. 121.

"adequately, efficiently and economically" by SP&S and UP (J.S. App. B–23) is a factual determination, sustained by the lower court, that warrants no further review by this Court. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620; *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490–491.

In any event the findings are supported by substantial evidence. UP witnesses had received no complaints about existing service (Tr. 182, 762–763), which the carrier could expand and expedite if future traffic so warranted (Tr. 183–184, 243–250, 763). Indeed a witness for the Portland Public Docks Commission, though advocating four-way ownership, stated that UP had done a "yeoman" job for its nearby traffic (Exh. 23A, pp. 2–3). SP arguments as to deficiencies in existing service, as based on a random 10% sample of shipments, were put in proper perspective by UP as to its service (Tr. 759–766) and in any event merely deal with inferences from evidence. Three shippers located on Peninsula's line had no complaints as to UP and SP&S (Exh. 31, Tr. 362–366; Exh. 32, Tr. 401–406; Exh. 34, Tr. 387–401). While two adjacent potential Rivergate shippers supported SP, their major hope was for single line service which could not occur in any event without substantial fill and track construction (J.S. App. B–22; Tr. 376–378; Exh. 5A), which was by no means certain. The only actual Rivergate shipper appearing at the hearings complained about all railroads serving it, including SP. Its interest was concentrated on special purpose drop-end gondola cars and a possible elimination of a curve in Peninsula's

tracks (Exh. 38; Tr. 301–322)—neither of which goals, as the Commission found, would be furthered by four-way ownership. (J.S. App. B–21—B–22).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY, TO AFFIRM

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No. 903

In The

Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY, TO AFFIRM

Appellees, Spokane, Portland and Seattle Railway Company (SP&S) and Union Pacific Railroad Company (UP) (sometimes collectively referred to as joint applicants), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, jointly move that the final order and judgment of the District Court be affirmed on the ground that the questions on which the appeal depends are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from a unanimous decision of a three-judge district court affirming the report and

order of the Interstate Commerce Commission (Commission) approving the acquisition of Peninsula Terminal Company (Peninsula) by SP&S and UP. In its report and order, the Commission prescribed labor and traffic protective conditions and denied the petitions for inclusion and trackage rights of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) and Southern Pacific Transportation Company (SP), appellants in this case, said petitions being filed pursuant to Section 5(2) of the Interstate Commerce Act (49 USC 5(2)).

The Commission also denied the separate applications of SP for joint use under Section 3(5) of the Act (49 USCA 3(5)), of terminal facilities and/or UP main line facilities which SP would need to operate directly to and from the small interchange yard at North Portland where SP&S and UP tracks meet and then connect with Peninsula.

Peninsula is a small terminal railroad with 3.79 miles of main, side and interchange track serving 14 industries. Peninsula's track was originally established in the early 1900's as an essential part of the Portland Union Stockyards to facilitate handling of livestock and to provide a rail connection, through the North Portland Yard, with SP&S and UP's operating predecessor in interest, the Oregon-Washington Railroad & Navigation Company (OWR&N).

The SP&S and the OWR&N at one time switched the industries on trackage now operated by Peninsula

but since 1930, SP&S and its parent lines* and the UP have interchanged traffic between themselves and with Peninsula at the North Portland Yard which has an operating capacity of approximately 100 cars.

SP&S and UP have thus served the territory since the turn of the century, and it was only natural that United Stockyards Corporation (United), the non-carrier owner of Peninsula, should seek out these trunk line carriers and offer Peninsula to them at a price set by an independent appraiser. United no longer desires to continue as owner of Peninsula, and the offer was made to SP&S and UP because these carriers are the operating lines which connect and physically interchange traffic with Peninsula.

The close proximity of the Rivergate Industrial District (Rivergate) at the west end of Peninsula's main line and the potential connection of Peninsula with a proposed Rivergate rail system gave rise to unusual carrier, industry and public agency interest in this proceeding. Peninsula owns no tracks within Rivergate although it serves the Crown Zellerbach pole yard from the west end of its main line over industrial tracks owned by Crown Zellerbach (J.S., App. B-5). Rail service into Rivergate from the northeast could be offered via Peninsula or from an adjacent SP&S main line, but the route has not been decided (J.S., App. B-5).

Rail service to Rivergate through its Southwest Gateway is furnished by SP&S and UP for themselves

*Great Northern Railway Company (GN) and Northern Pacific Railway Company (NP), collectively known as the Northern Lines, each owned 50% of the stock in SP&S prior to their merger with other carriers into the Burlington Northern Inc. (BN).

and connecting carriers including SP and Milwaukee, with UP performing the actual switching service. (R 27, Ex. 39,* and J.S., App. B-5).

Appellants' case before the Commission and District Court was based on the assertion that inclusion of Milwaukee and SP in ownership of Peninsula with rights to use intervening track owned and operated by SP&S and UP is necessary to afford a direct physical connection with Peninsula and that this would aid in the development of Rivergate. Following hearing, the Examiner recommended acquisition of an equal interest by SP&S, UP and SP in the common stock of Peninsula and approved acquisition by Milwaukee of an equal interest upon its extension to Portland. The Examiner also recommended that SP and Milwaukee be given access over intervening track to reach Peninsula.

Upon exceptions filed by SP&S and UP and the Brotherhood of Locomotive Engineers (BLE), the Commission found that substitution of SP&S and UP control of Peninsula for that of United, subject only to traffic and labor protective conditions, was in the public interest (J.S., App. B-15, 29).

The Commission's report shows a consideration and weighing of all evidence and arguments and a resulting analysis that, on the whole, appellants' case merely shows a desire for direct service of as many railroads as possible into Rivergate and does not establish a *need* for such service (J.S., App. B-23). This conclusion is

*All similar references are to the complete record before the Commission stipulated by the parties to the three-judge court.

backed by well articulated findings on all evidence of record.

In deciding the merits of the Milwaukee and SP petitions for inclusion and use of terminal facilities, the Commission held that each must meet public interest requirements under the same criteria, and that Milwaukee's petition could not be viewed as a petition to carry out the provisions of Condition No. 24 of the Northern Lines merger (J.S., App. B-18, B-19). *Great Northern Pac. & B. Lines, Merger—Great Northern Ry., etc.*, 328 ICC 460 (1966); 331 ICC 228 (1967), affirmed in *United States v. I.C.C.*, 396 US 491 (1970).

Following its conclusion that the statutes involved must receive uniform application, the Commission focused on the public transportation requirements of the area, finding that since neither SP nor Milwaukee have ever connected with Peninsula, their direct service to Peninsula's industries would constitute a new operation and an invasion of territory (J.S., App. B-20). It found that under such circumstances, sound economic conditions in the transportation industry require that railroads serving the territory be accorded the right to transport all traffic therein they can handle adequately, efficiently and economically before a new operation should be authorized (J.S., App. B-21).

The Commission further decided the SP and Milwaukee invasion could only increase their share of traffic at the expense of SP&S and UP and their employees (J.S., App. B-21), and based on its review of the whole record, the Commission found there was no evidence

to show that SP&S and UP could not handle present and future traffic in the territory adequately, efficiently and economically (J.S., App. B-23). From this and the adverse effect inclusion would have on shippers dependent upon SP&S and UP for service, the Commission found inclusion under Section 5(2) with the accompanying requests for trackage rights under that section would not constitute a just or reasonable term, condition or modification of the SP&S and UP application (J.S., App. B-23). The Commission also concluded, based on the foregoing considerations and the lack of an existing right to connect with Peninsula or to serve Rivergate, that the separate SP Section 3(5) applications should be denied.

The case was presented to the Commission again through petitions for reconsideration and petitions for a finding of General Transportation Importance and these were denied (J.S., App. C and D). After submission on brief and after oral argument before the three-judge court convening in Portland, Oregon, the Commission decision was unanimously affirmed (J.S., App. A).

ARGUMENT

The Jurisdictional Statement and the Memorandum of the United States fail to present any substantial questions which would warrant full argument before this court. Appellants present four separate arguments which deal with the fundamental issues of substantial evidence and adequacy of findings and the correct application of the law. The United States raises another

argument challenging the Commission's refusal to give Milwaukee's application preferential treatment.

Substantial evidence is defined as enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn from the evidence is one of fact for the jury. *Illinois Central R. Co. v. N. & W. Ry. Co.*, 385 US 57, 66 (1966).

Adequate findings are presented if the report, read as a whole, sufficiently expresses the conclusions of the Commission, based on supporting data, to enable the court to perform its limited function of review. The Commission report need not deal specifically with each contention of the parties, and its findings may state that matters not specifically discussed have been considered and not found justified when other determinations in the report articulate a basis for decision. *Alabama G.S.R. Co. v. U.S.*, 340 US 216, 228 (1951); *Seaboard Air Line RR v. U.S.*, 268 F Supp 500, 503 (DC Va. 1967).

With respect to the merits of the case, the court will not inquire whether the transaction satisfies its own concept of public interest, the determination of factors relevant to public interest being entrusted by law primarily to the Commission, subject to the standards of the governing statute. *U. S. v. I.C.C., supra*, 396 US at 503.

As we will demonstrate, the arguments pose no other questions and fail to bring forward substantial questions of error on these issues.

1. The Commission correctly applied the legal tests of the Statutes involved within the framework of the evidence before it.

(a) The Commission gave full consideration to the Rivergate area.

Appellants argue that the Commission erroneously restricted its consideration of the public interest by refusing to consider the Rivergate area and its potential in resolving the public interest factor of this case. This is simply not correct, as a reading of the report shows. The evidence of public agencies concentrated on the present and potential transportation needs of Rivergate, and such evidence was fully considered as the following excerpt from the report shows:

> "*Intervenors* — The petitions and applications of Milwaukee, and SP are supported by the Port, the Portland Commission of Public Docks, City of Portland and Oregon Commission. The positions of these intervenors are set forth in excerpts from the Hearing Examiner's report appended hereto and need not be repeated. * * *
>
> ". . . The excerpts describing public agency and shipper intervenors' positions are appended for information only. The positions they reflect are not to be understood as having been adopted by us . . ." (J.S., App. B-11)

The appended material just referred to is found in the Jurisdictional Statement, Appendix B, pages 47 through 55. These pages contain traffic estimates, reference to development costs and all other contentions of public bodies concerning the wish for SP and Milwaukee direct service. The Commission was therefore well aware of the importance appellants placed on the

future of Rivergate and did not in any way ignore Rivergate's potential.

Appellants incorrectly assert:

"As the Rivergate area develops, trackage from Peninsula will be extended to meet the needs of future shippers." (J.S., page 9)

The United States wrongly argues:

"Peninsula's tracks provide one of two rail access routes to Rivergate." (Memo, page 2)

The Commission correctly found that the Port's consultants, in 18 months of study, recommended connection by any Rivergate rail system with adjacent trunk lines and that the connection from the northeast be progressed either as "an SP&S main line extension or an extension of Peninsula's track into the area." (J.S., App. B-5).

Whether Peninsula will ever be used as a means for serving the east end of Rivergate was never substantiated on the record. The Port witnesses refused to state any preference for service into Rivergate via Peninsula (Tr. 602-603), and evidence presented by SP&S and UP showed that the Port's consultants recommended a rail system which connected with the SP&S main line (R 27, Ex. 28, page 6).

The Commission's focus on Peninsula (which in the context of this decision means the Peninsula-Rivergate area) instead of the whole Portland area was the only course available since appellants' evidence dealt almost solely with this territory. No consideration could be given to exact rail traffic patterns in the greater Port-

land area or in the separate rail yards and terminals of all carriers in the case because there was no evidence on this point. The Examiner had to go far beyond the record to conclude that the whole Portland area was one terminal transportation entity, and the Commission was merely bringing the case into line with the evidence before it when it focused on the needs and desires of the Peninsula-Rivergate area.

(b) Treatment of entire Portland territory as one transportation terminal entity is unsupported by evidence and could give rise to prolonged litigation.

Aside from the lack of evidence to support treatment of the Portland territory as one terminal transportation entity, attempts by SP and Milwaukee to extend service to stations and industries on lines of other railroads amply support the Commission's concern that more problems and litigation, disrupting the growth and development of Portland, would follow adoption of the Examiner's conclusion than the "divisive determinations" he feared (J.S., App. B-20).

The report shows the Commission was considering the Section 3(5) as well as the Section 5(2) requests of SP and Milwaukee when it rejected the Examiner's erroneous premise. The first paragraph addressed to the *Merits of petitions for inclusion* (J.S., App. B-18) show this:

> "We possess the necessary jurisdiction *to require inclusion* (under Section 5(2)) . . . and to authorize the common use of terminals (under Section 3(5)) . . . ." (Emphasis added.)

The Commission therefore had the relief sought under both sections in mind when three paragraphs later it rejected the one terminal entity theory for the reasons therein noted (J.S., App. B-20).

Appellants are wrong when they say only under Section 5(2) proceedings can a carrier seek to serve stations and industries on lines of other carriers (J.S., page 12). In this instant case, both intervening railroads sought to reach North Portland and tracks of Peninsula under provisions of Section 3(5). (See pleadings R 4, R 8, R 10, R 19).

The Commission also correctly found:

> "SP asks that it be authorized to use the UP trackage under Section 3(5) of the Act in the *event either or both of the joint applicants decline to participate in the acquisition of Peninsula subject to the conditions SP requests.*" (J.S. App. B-9) (Emphasis added.)

All of this illustrates that if Portland could be considered to be "one transportation terminal entity," carriers in that undefined geographic area would use Section 3(5) to reach through yards and terminals and over main line tracks of other lines to invade stations and industries serviced by other railroads without regard to the disruption and interference such invasion might create. The existence of a definite unified terminal operation within a defined area normally must be established before the powers under Section 3(5) are invoked. *Chicago & Alton R.R. Co. v. T., P. & W. Ry. Co.*, 146 ICC 171, 178-179 (1928).

Appellants inaccurately argue (J.S., pages 12-13) that SP "never asserted that its mere presence" gave it the right to serve all stations or industries anywhere within the Portland area. In SP's reply to exception 6 (R 41, page 38), SP contended that the issue of full trackage rights over the involved UP main line was before the Commission under one of its Section 3(5) applications. Thus, SP strenuously sought rights, under the factual setting of this case, to serve all stations and industries within an undefined geographic area in Portland.

Later, in its petition for reconsideration (R 49, page 42), SP retreated from this position claiming that it sought merely "bridge rights" under the same application. This SP action is notice enough of the dangers foreseen by the Commission when it correctly assessed the adverse effect of a "one transportation terminal entity" conclusion.

2. The Commission correctly found SP&S and UP service to and from Peninsula to be adequate and efficient.

Applicants incorrectly infer (J.S., page 14) that granting of SP and Milwaukee inclusion will permit them to "serve industries in the developing Rivergate area." As we pointed out before (page 9, supra), the Commission correctly found that Peninsula is one of two possible access routes into the northeast part of Rivergate. SP and Milwaukee inclusion as owners of Peninsula will therefore not insure their direct access to the territory they already serve via connections nor will it cause Peninsula to extend into Rivergate since many

physical impediments make Peninsula's use inferior to an extension from the SP&S main line.*

In deciding the public interest facets of this case, the Commission found that service to the Peninsula-Rivergate territory would be unaffected by passing of control from United to joint applicants who connect with Peninsula (J.S., App. B-5). The Commission also found that evidence offered by shippers supporting SP's position as well as evidence offered by SP and Milwaukee themselves failed to establish that joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently and economically (J.S., App. B-23). This finding is on an issue raised by appellant rail carriers and their evidence was determined insufficient.

Now appellants ask this court to reweigh evidence, contending that not a single shipper supported the Commission's conclusion (see J.S., page 15). The report shows the contrary with the Commission reviewing all the shipper testimony (J.S., App. B-21-23) and among other things correctly finding that "... only three of the thirteen shippers located on Peninsula's line participated in these proceedings and they supported the applicants." (J.S., App. B-21).

Appellants again misstate the evidence by characterizing an approximately 30-hour time lapse from the SP-UP interchange to the UP-Peninsula interchange at North Portland as time required to move a car 5.2 miles (J.S., page 15).

*Heavy curvature, impaired clearances and low standard track make use of Peninsula as an access route highly questionable (J.S., App. B-36).

The 30-hour time lapse is the time required to perform all railroad functions in the interchange of Peninsula traffic including yarding, sorting, inspecting, switching and moving via the Kenton industrial area of UP to North Portland (Tr. 244). The UP—"Kenton Turn" is used in handling North Portland traffic because the same engine is used to pick up and set out the Kenton traffic to be interchanged at North Portland with the SP&S and parent lines. The Kenton engine also handles SP and UP traffic to be interchanged with Peninsula at North Portland, this being the most economical and efficient service considering the traffic level involved (Tr. 247).

The evidence is undisputed that when direct service is required, the Peninsula traffic is handled directly to North Portland without taking the Kenton route (Tr. 245-256). Since around 61% of the 7,600 to 8,600 carloads annually interchanged at North Portland* originate or terminate at Kenton industries, the method just noted affords the most economical service consistent with present needs and assures four SP&S and two UP pickups and setouts daily (J.S., App. B-36).

SP's Traffic Manager failed to support that carrier's contention that it would offer better service (Tr. 535-536), basically because railroading necessary to prepare its traffic for interchange would merely be transferred from UP forces to those of SP. If appellants' position is adopted, the work now done by two railroads would be

*Of the remaining, 3,640 cars in 1966 and 2,748 cars in 1967, SP shared 20% and 17%, respectively, through connections and use of joint rates and routes. Milwaukee's share was about 1% each year (J.S., App. B-21).

performed by four carriers in a wasteful duplication of service adversely affecting shippers depending on all railroads.

No Peninsula shippers complained that present service is inadequate, and the station agent who is in direct daily contact with shippers and receivers had only six or eight complaints a year (Tr. 76-77).

Crown Zellerbach, who supported appellants' proposals, experienced no unusual delays at their Peninsula facility (Tr. 318-319). Other shippers supporting SP were located in South Rivergate, and their testimony could in no way bear on service via Peninsula as they had not experienced any such service (J.S., App. B-22-23).

SP's Traffic Manager claimed service deficiencies yet could not state how many or when complaints were received and failed to follow up on them (Tr. 533-534). Neither the UP General Manager nor the UP Assistant Superintendent had received complaints on service (Tr. 182, 759 and 763).

As to SP's Exhibit 45, a study conceived and prepared by SP in an effort to show poor service—not by shippers or consignees complaining of existing service—numerous cars were mishandled because of inadequate information forwarded by SP (Tr. 760-761); numerous cars were received on Friday and not physically spotted until just before the next working day (Tr. 762); and at least three were tendered empty and spotted ahead of the date they were ordered (Tr. 763-764). The exhibit

therefore fails to support SP's contention that service is inadequate.

Crown Zellerbach's petition for reconsideration (R 48) relied on a letter describing service between its facility in South Rivergate and Albina via the UP Barnes Yard, an area Peninsula cannot reach. The letter simply traces the procedure to be followed in handling SP cars from time of order to time of return. It said that when in excess of 25 outbound cars are tendered, UP will run a direct transfer move, otherwise, UP crews will perform additional work en route. Conspicuous in its absence is any response from Crown Zellerbach stating how the service failed its needs. Also conspicuously missing is any commitment from SP for service via Peninsula or any other route to satisfy Crown Zellerbach's concern.

The above resume shows substantial evidence to support the Commission's findings concerning the adequate and efficient service furnished by appellees.

3. The Commission correctly construed Section 3(5) of the Interstate Commerce Act and properly rejected the two SP applications filed pursuant thereto.

The Commission rejected the SP applications under Section 3(5) because the intent of Congress in enacting that section sought to provide a method of avoiding "unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory." (J.S., App. B-24)

Besides the cases cited by the Commission (J.S., App. B-24) in support of its conclusion, many decisions

have held, consistent with the National Transportation Policy, that duplication of terminal services is contrary to the public interest, especially when railroads generally are having financial difficulties and the proposed service is not needed. See, as example, *Competitive Produce Terminals at Denver, Colorado*, 235 ICC 699, 713 (1940). In fact, most denials of Section 3(5) applications have been based on an unwarranted duplication of effort in light of service available and the use already made of terminal and main line track by owning lines. See, as examples, *York Mfgrs. Assn. v. P.R.R. Co.*, 73 ICC 40, 50 (1922); *Port Arthur C. of C. v. T. & F.S. Ry. Co.*, 73 ICC 361, 364 (1922); *Hastings Commercial Club, et al. v. C., M. & St. P. Ry. Co.*, 107 ICC 208, 216 (1926); *Muskegon Ry. & Nav. Co. v. Pere M. Ry. Co.*, 148 ICC 653, 661 (1928); *Southern Pac. Co. v. Atchison, T. & S.F. Ry. Co.*, 188 ICC 557, 560 (1932); *Jamestown, N.Y., C. of C. v. Jamestown W. & N.W.R. Co.*, 195 ICC 289, 292 (1933); and *City of Hialeah, Fla. v. Fla. East Coast Ry. Co.*, 317 ICC 34, 36, 37 (1962).

Appellants do not challenge the Commission rationale in denying the Section 3(5) applications, i.e. avoidance of wasteful duplication, but claim instead "failure to deal" with one of the two SP applications (J.S. page 17).

Both applications were, in effect, merged into one when, on the record, SP counsel stated that under Finance Docket No. 24890, SP did not seek to use Peninsula trackage (Tr. 406-411). With this clarification, both SP Section 3(5) applications sought the same re-

lief, which SP finally denominated to be bridge rights over UP track as "terminal facilities" (R 49, page 42).

The Commission, nonetheless, still dealt with each Section 3(5) application, noting they were filed because of the permissive nature of authorizations under Section 5(2), and deciding the ultimate issues under the Section 3(5) applications after fully considering contentions as to fact and law under both of them (J.S., App. B-9, 10, 24 and 29).

Use of Northern Pacific's Tracks at Seattle by Great Northern, 161 ICC 699 (1930), makes no reference to joint ownership of terminal facilities as a necessary prerequisite to invoking Section 3(5) as appellants infer. In that case, the Commission plainly concluded, however, that had Great Northern not already served the Lake Union-Terry Avenue District, its use of connecting track would amount to an extension of line into new territory requiring a certificate of convenience and necessity under Section 1(18) of the Act (161 ICC at 704).

Seaboard Air Line RR—Use of Terminals, 327 ICC 1 (1965), 267 F Supp 986, affirmed per curiam 386 US 8, was based on the need to continue service to a port, and the carrier acquiring common use of terminal facilities under Section 3(5) was permitted to continue to render the same service in the new location without invading another railroad's territory.

Appellants' argument that, if followed to its logical conclusion, *Seaboard, supra*, calls for a "follow the traffic" concept, may be correct. Needless to say, such concept is no stranger to transportation law. See *Smith and*

Solomon Trucking Co., Extension—Camden, N. J., 61 MCC 748 (1953), and *Smith and Solomon Trucking Co. v. U.S.*, 120 F Supp 277 (DC NJ 1954).

Erie R. Co. Acquisition, 275 ICC 679 (1950) cited by appellants strengthens the conclusion they seek to overturn. In that case Erie wished to assume rights over ¾ of a mile of the New York Central's main line over which the International Railway had operated. Central objected to the assignment of its trackage agreement and declined to make a similar agreement with Erie. Approval of the Section 3(5) application permitted the continuation of the same existing service and did not, as in the instant proceeding, involve an invasion of territory.

The cases all stand for the same proposition, and in each instance no *new service* was authorized or duplicative service instituted on the pretext of a Section 3(5) terminal use. They form no support for Appellant's argument.

4. The Commission's approval of the SP&S and UP applications subject only to traffic and labor conditions is in all respects lawful and does not constitute a violation of the antitrust laws.

The statute here involved, Section 5(11) of the Act, exempts corporate affiliations considered and approved under Section 5(2) from Anti-trust Laws where the Commission makes adequate findings that such affiliation is consistent with the public interest, and where such findings are adequately supported by the evidence.

McLean Trucking Co. v. U.S., 321 US 67 (1944), says that the Commission is "to estimate the scope and appraise the effects of the curtailment of competition and consider them along with advantages of improved service, safer operation, lower costs, etc." (321 US at 87). Other cases cited in the United States memorandum say basically the same thing.

The point here which the appellants and government both ignore is that the Commission correctly found that there would be *no* change in competition. Joint applicants' competitive position will not be enhanced by ownership of Peninsula stock. They now connect with Peninsula and will continue to do so. Peninsula now switches its own industries and will continue to do so. Rates and routes are now open to Milwaukee and SP, will be continued, and no other competitive relationships will be changed.

Maintenance of the status quo is the optimum status that could be had when a question of curtailment of competition is at issue. Once this has been determined, there seems to be little need to recite anything further under the requirements of Section 5(11) or cases construing it. Naturally, each case must be judged on its own merits and here, as the following resume shows, the Commission's decision as a whole provides all findings required by Section 5, including Section 5(11).

The Commission correctly concluded that service by Peninsula to industries will be unaffected by the substitution of joint applicants' control for that of United (J.S., App. B-15); that litigation and disruption in

growth and development of the area would be more likely under four-way ownership than under two-way ownership (J.S., App. B-20); that passage of control to applicants is consistent with past and present service rendered in the Peninsula area and that joint applicants have the ability to fulfill future requirements (J.S., App. B-15 & 23); that participation in handling of present and future traffic of SP and Milwaukee as connecting lines can be maintained with the least disruption to applicants and their employees by granting only the SP&S and UP application (J.S., App. B-21-23); and that evidence of shippers and public agencies has failed to establish a present or future need for either SP or Milwaukee ownership of or connection with Peninsula (J.S., App. B-21-23).

To further protect interests of the public (including public agencies, shippers and carriers), the Commission found that Peninsula's present routes and interchange should remain unchanged and to insure this, at the suggestion of joint applicants, the Commission prescribed traffic conditions, modified not only to cover Peninsula but also SP&S and UP* (J.S., App. B-25-26).

The Commission also imposed the "New Orleans" labor protective conditions as requested by the intervening Brotherhood of Locomotive Engineers with a special arbitration provision (J.S., App. B-26-27).

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*The government incorrectly infers, as did appellants, that the Commission approved the "unconditioned acquisition of Peninsula" (Memo, page 9). The foregoing demonstrates that the Commission took extra precautions to maintain a competitive situation which the Commission found would remain unchanged.

The government's argument that Milwaukee and SP inclusion would not involve an invasion of territory simply has no legs on which to stand (Memo, page 11). Neither Milwaukee nor SP has ever directly served the Peninsula-Rivergate territory though each freely participates in traffic to and from all of this area as connecting lines. Physical access over tracks of SP&S and UP requested as part of inclusion is simply neither feasible nor justified on this record, but full access as connecting lines has never been resisted or denied by joint applicants.

The financial weakness of Milwaukee was never a major evidentiary fact of record in this case and the lack of citations when arguing this point substantiates this. By the same token Milwaukee, who is an appellant herein, has not pushed this argument with the zeal evidenced by the United States, which of itself raises doubt as to its propriety.

Needless to say, even in cases where fully proved, such an economic factor is but one facet of the complex public interest decision which Congress and the courts agree is for the Commission to make, based on evidence before that agency.

For the foregoing reasons, the Commission completed its function under Section 5 and complied in all respects with paragraph 11 thereof, as interpreted by the *McLean* case and other decisions in point, and the contentions of the parties to the contrary raise no substantial issue.

5. The Commission correctly decided the Milwaukee's application on the same basis as other applications before it.

The United States suggests that the Milwaukee application should have been given preferential treatment by the Commission. It urges that Condition 24(a) of the Northern Lines merger case and not the evidence before the Commission in this proceeding should control. The portions of the report the government claims erroneous read:

> "With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern*

> *Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24." (J.S., App. B-19)

The United States correctly states that Condition 24(a) was a product of an agreement between Milwaukee and the Northern Lines as were all conditions between those parties in that case (Memo, page 5). Neither Condition 24(a) nor the underlying contract expressly require Milwaukee's admission to all industries and interchanges in the Portland area.

There are numerous other interchange points and yards in Portland partly owned by the Northern Lines, and none of the other owning carriers have ever been given to believe that Condition 24(a) was intended to cover such facilities. If the government's argument is correct, logically Milwaukee could use all such points. Not even Milwaukee has ever contended this broad an application of condition 24(a).

The contract behind Condition 24(a) was placed in evidence by Milwaukee as an attachment to Exhibit 53 (R27, Exhibit 53). It provides in part:

> "To the extent that Nu-Co. or SP&S can do so, it will grant to Milwaukee trackage rights *over present Northern Pacific and SP&S tracks* between Longview Junction, Washington, and Portland, Oregon, including all main, second, passing and industry tracks and over SP&S tracks in the D Line Valuation area in Portland." (emphasis added)

At no time has there ever been any misconception by Milwaukee of what rights it would obtain under Con-

dition 24(a). As illustrated above, the contract which it voluntarily made implementing this condition with respect to its entry to Portland limits the trackage rights it will receive to trackage owned by the merged company and SP&S. Consequently, the Commission's finding that Condition 24(a) is applicable to Northern Lines trackage and territory is plainly correct.

Since the Commission's decision in this case in no way modifies or limits the right which the Commission said Milwaukee should receive when it established Condition 24(a) and which Milwaukee itself expected to receive under the Northern Lines merger, there is no merit to any argument advanced by the United States based on the decision in the Northern Line case or the imposition of Condition 24(a) in that case.

Any interpretation of the application of Condition 24(a) should be based on the record in the Northern Lines case and this is what the Commission specifically left open to the Milwaukee in this case when it held, in a footnote:

> "Upon completion of litigation in the Northern Lines case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of Condition No. 24, if any, to Peninsula's track which would at that time be partially owned by the Northern Lines." (J.S., App. B-19)

The Government's contention that this decision effectively denies Milwaukee an opportunity to compete for Rivergate traffic is without merit. As noted in the prior section, the present service of Peninsula will be

unaffected and Peninsula's present routings and interchanges will be maintained, unchanged by joint applicants. Traffic conditions suggested and accepted by joint applicants insure this (J.S., App. B-25-26). Further, joint applicants stand committed on the record of this case to maintain open rates and routes that now exist and treat all future requests without discrimination or partiality (R 27, Ex. 29, page 2-3). This same protection is afforded under Section 3(4) of the Act (49 USC 3(4)). Relief may be sought through complaints to the Commission under Section 13 of the Act (49 USC 13).

Had the Commission or the lower court accepted the Government's argument, a substantial preference would have been afforded Milwaukee over SP&S, UP and SP, all carriers who had to make their case on the instant record and not benefit from conditions imposed in another proceeding. No error, therefore, exists in rejecting the government's contentions just noted.

Apparently the Government has misread the Commission report when it presumes that Condition 24(a) could be implemented "but for the fact that Burlington Northern joined Union Pacific with it in its take over of Peninsula." (Memo, page 7). This is patently incorrect since the Commission's refusal to treat Milwaukee inclusion as a special right as the Government contends it should (Memo, page 9) came from the fact that Condition 24 plainly applied only to BN property.

The Government may mistakenly believe Milwaukee planned to operate trains and engines over Peninsula or

take Peninsula trackage in its own name (Memo, page 8, fn.). This, too, is incorrect since the right to purchase stock is all that was sought by anyone in this proceeding, and this alone could not give Milwaukee rights to run trains on Peninsula trackage including the jointly owned interchange trackage in the North Portland Yard.

In light of the foregoing, the Government's contention that Condition 24(a) should be used as *the* basis for granting Milwaukee's applications, suggests the grossest conceivable form of arbitrary and unreasonable conduct. Joint applicants submit this point raises no substantial issue which would warrant further consideration by this court.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

JAN 18 1971

No. ~~000~~ 70-31

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from The United States District Court
for The District of Oregon

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 903

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from The United States District Court
for The District of Oregon

Brief in Opposition to Motions to Affirm

Pursuant to Rule 16, Paragraph 4 of the Rules of this Court, appellants file this Brief in Opposition to Motions to Affirm filed by appellees, Spokane, Portland and Seattle Railway Company, Union Pacific Railroad Company and the Interstate Commerce Commission. The statutory defendant, United States of America, has heretofore filed a "Memorandum for the United States" which supports the position of appellants.

Appellants will reply to each of the Motions to Affirm separately and will be brief since many of the points raised in the Motions to Affirm simply do not come to grips with the questions presented in the Jurisdictional Statement.

REPLY TO MOTION OF APPELLEES SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY TO AFFIRM.

1. The Commission Applied Erroneous Legal Tests in Determining Public Interest.

a) The Commission Ignored the Rivergate Area.

In rebutting the allegations of the Jurisdictional Statement as to the substantiality of this question, the appellees claim the Interstate Commerce Commission in its Decision gave full consideration to the Rivergate area. This is simply not so. Appellees recognize that the close proximity of the Rivergate area to Peninsula's main line and the potential connection of Peninsula with the proposed Rivergate rail system was the factor which gave rise to unusual carrier, industry and public agency interest in this proceeding (Motion to Affirm, p. 3). However, the Commission in deciding this case chose to ignore Rivergate as a factor in resolving public interest. Its language is plain and unambiguous:

> ". . . we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor." (J.S., App. B-20)

Appellees claim that since the position of intervenors (appellants here) was set forth in excerpts from the Hearing Examiner's Report and appended to the Commission's Decision, the Commission necessarily considered Rivergate as a factor in resolving public interest. The simple answer to appellees' claim is that the Commission by its language, *supra*, has made it crystal clear that it refused to consider Rivergate. The availability of the evidence had no bearing —it was not considered.

Appellees also seek to leave the impression that there is nothing in the record which would substantiate the fact

that Peninsula will be used as a means for serving the east end of Rivergate. (Motion to Affirm, p. 9) This is startling since a witness on behalf of appellees stated that changes would be made in Peninsula's tracks to connect with Rivergate when required by the traffic. (R-27, Ex. 26, p. 10)* That there will be a large amount of traffic to and from Rivergate is undisputed and at full development, 500 to 600 freight cars per day will be handled to, from or within the Rivergate area. (R-27, Ex. 1, p. 5-1)**

Although the attempt by appellees to in some way infer that the Commission did consider Rivergate in determining the public interest factor is understandable, we submit that the only way to determine whether this is true or not is to examine the Commission's language. As pointed out, such an examination establishes that no consideration was given to Rivergate.

By restricting its consideration solely to Peninsula, a small and almost infinitesimal part of what this proceeding is about, the Commission clearly did not appraise public interest from the standpoint required. See *Detroit, T. & I. R.R. Control*, 275 I.C.C. 455, 488 (1950); *City of Hialeah, Fla. v. Florida East Coast Ry., et al.*, 317 I.C.C. 34 (1962).

b) The Commission Erroneously Concluded That Treatment of the Entire Portland Area as One Transportation Entity Would Allow Every Railroad in the Undefined Portland Area to Serve the Stations and Industries of Any or All Other Railroads.

Evidently, appellees have conceded that insofar as § 5(2) proceedings are concerned (49 U.S.C., § 5(2)), the fears of the Commission are illusory and could not and would not provide grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads.

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*All similar references are to the complete record before the Commission stipulated by the parties to the three judge court.

**Expected development of Rivergate is thoroughly discussed in the Petition of the Port of Portland for Reconsideration and Further Hearing before the Interstate Commerce Commission. (R-50, p. 27-32)

The sole argument advanced is that this expressed fear of the Commission, a factor upon which it based its decision, also encompassed § 3(5) proceedings (49 U.S.C., § 3(5)).

In support thereof appellees cite from the Commission's Decision the first paragraph addressed to the *Merits of petitions for inclusion* (J.S., App. B-18). Either by design or inadvertance, appellees did not quote the entire paragraph. The entire paragraph reads as follows:

> "*Merits of petitions for inclusion.*—Though we possess the necessary jurisdiction to require inclusion of Milwaukee and SP in a four-railroad control of Peninsula and to authorize the common use of terminals and facilities requested by SP, *such control* must meet the public interest requirement before any condition we might impose in these respects can be found just and reasonable." (Emphasis added.)

When the entire paragraph is read, it is clear that the Commission was referring to the control application under § 5(2) of the Act and the conditions it may impose in such a situation. See *Atlantic C. L. R.R. v. United States*, 48 F.2d 239, 244 (1931), *aff'd*, 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932).

Appellees next state that appellants have inaccurately argued that SP "never asserted that its mere presence" gave it the right to serve all stations or industries anywhere within the Portland area. (Motion to Affirm, p. 12) There was nothing inaccurate in any respect about that statement. Reference to the Jurisdictional Statement, pages 12 and 13, shows that the statement had reference to an application under § 5(2) of the Interstate Commerce Act and had no relation to § 3(5) applications. Even if the statement had purported to cover a § 3(5) application, there was no inconsistency in SP's position since its Opening Brief before the Commission pointed out that under

§3(5) bridge track rights were sought. (R-24, p. 13) No evidence was offered as to any intention to serve intermediate points or industries and it was only after the examiner found that the granting of full user rights over the involved accessorial trackage was *most responsive to the public interest* that SP pointed out that its Application in Finance Docket No. 24891 was broad enough to support what the examiner found to be in the public interest. (R-41, p. 38) After the Commission reversed the examiner, SP quite properly stated that it merely sought bridge rights under the Application. (R-49, p. 42) The alleged inconsistency sought to be shown by appellees does not exist.

2. There Is No Substantial Evidence to Support the Commission's Conclusion That Service of Union Pacific and SP&S to and from Peninsula Is Adequate and Efficient.

Appellees allege that appellants are asking this Court to reweigh evidence. That is not the fact. We have stated there is no substantial evidence to support the Commission's finding that Union Pacific and SP&S are providing adequate and efficient service to Peninsula. (J.S., p. 15) We reiterate that statement in this Brief in Opposition. In fact, all evidence of record compels a contrary finding.

Appellees, in an effort to demonstrate that there was testimony to support a finding of adequacy of UP and SP&S service, point to the fact that three of the 13 shippers located on Peninsula's line participated in these proceedings and they supported the applicants (appellees here). What is not pointed out by appellees is that this shipper testimony did *not* have reference to the adequacy and efficiency of the service of Union Pacific and SP&S to Peninsula *but to the service after the traffic reached Peninsula.* (R-26, Tr. 395, 403) This is an entirely different matter and, thus, it is not appellants but appellees who misstate the record. (Motion to Affirm, p. 13)

Appellants are also accused of misstating the evidence concerning the approximate 30-hour time lapse for move-

ment of SP cars from the SP-UP interchange to the UP-Peninsula interchange at North Portland. There was no misstatement on the part of appellants. This is the clear and unequivocable testimony of the General Manager of appellee Union Pacific. (R-26, Tr. 181-82) Appellees are critical of SP's Exhibit 45, which was a ten percent random sample showing the extraordinary length of time taken to deliver these cars to and from Peninsula during the year 1967. Appellees characterize this as a "study conceived and prepared by SP in an effort to show poor service"—appellees are entirely correct in their characterization and appellees' General Manager merely confirms the evidence offered by Southern Pacific.

There is much extraneous discussion about the performance of all railroad functions such as yarding, sorting, inspecting and switching being included within the 30-hour time lapse. Nobody has ever disputed this matter, but the fact remains no matter how appellees wish to characterize it, that from the testimony of their own witness, it took approximately 30 hours for Southern Pacific cars to move from Union Pacific's Albina Yard to the North Portland Interchange, a distance of approximately 5.2 miles. The record reveals unanimous agreement that such service is not adequate or efficient. (J.S., p. 15)

Appellants reiterate loud and clear that the record in this proceeding is patently clear that Union Pacific and SP&S are *not* providing adequate and efficient service to Peninsula.

3. The Rejection by the Commission of Common Use of Terminal Facilities Pursuant to § 3(5) of the Interstate Commerce Act Was Based on Erroneous Conclusions of Law.

Appellees' Motion to Affirm contains a section which claims the Commission correctly construed § 3(5) of the Interstate Commerce Act and was correct in its rejection

of the § 3(5) applications in this case. (Motion to Affirm, pp. 16-19) Appellees appear to have completely missed the point raised by the Jurisdictional Statement. The point actually is very simple. The Commission finds *as a matter of law* that any railroad seeking relief under § 3(5) of the Interstate Commerce Act must be entitled to serve the terminal facilities sought to be reached. The cases cited by appellants (J.S., pp. 16-19), including an analysis of the cases relied upon by the Commission, clearly show that this is not correct. The Commission is wrong in using erroneous conclusions of law as a reason for rejecting the § 3(5) applications. All the discussion by appellees involving invasion of territory, certificates of public convenience and necessity under § 1(18) of the Act, etc., simply has no bearing on the question raised.

4. The Commission Sanctioned a Violation of the Antitrust Laws by Permitting SP&S and UP to Acquire and Control Peninsula Terminal Without Conditioning Said Approval Upon Appellants Southern Pacific and Milwaukee Being Equal Owners of With Access to the Lines of Peninsula.

As pointed out in the Jurisdictional Statement, if appellants are correct that the Commission erred in focusing only on Peninsula to resolve the factor of public interest and that it also erred in finding UP service to and from Peninsula adequate and efficient and in turn used these errors to justify finding the transaction consistent with the public interest, then it is submitted that the exemption provided by § 5(11) of the Interstate Commerce Act has no application. *McLean Trucking Co. v. United States,* 321 U.S. 67, 88 L.Ed. 544, 64 S.Ct. 370 (1944).

Appellees discuss at length a theory of "no change" in competition as justifying applying § 5(11) of the Act to this proceeding. What appellees overlook is the public interest factor. (Motion to Affirm, pp. 20-21) As the United States so ably pointed out in its Memorandum supporting

appellants, the Commission when it examined the competitive impact, looked only to the impact that the inclusion of Milwaukee and Southern Pacific would have on the joint applicants but failed to consider any other factors which must necessarily be dealt with in order to determine where the public interest lies. (Memo for the U.S., pp. 10-11)

REPLY TO THE INTERSTATE COMMERCE COMMISSION'S MOTION TO AFFIRM

The first portion of said Motion to Affirm is the alleged justification for the Commission's failing to grant ownership and access to appellant Milwaukee. It attempts to answer the questions raised by the statutory defendant, the United States, in its Memorandum supporting appellants.

The Commission held that Milwaukee must go back to this same Commission in the *Northern Lines Merger* proceeding and ask for modification of the condition or imposition of new conditions. The error present in that holding is skillfully handled in the Memorandum for the United States, pages 4 through 8.

The Commission held that Condition 24 of the *Northern Lines* case was not applicable to trackage and territory in which other carriers, such as UP, had a joint interest and, thus, refused to give effect to the Portland condition in Milwaukee's favor in this proceeding. There appears to be no rational basis for the Interstate Commerce Commission's conclusion and as the United States has ably pointed out, it fails to understand how Condition 24 of the *Northern Lines* case can be evaded by joining Union Pacific in the takeover of Peninsula. As stated: "We fail to understand why Burlington Northern must be allowed to do jointly what it could not do alone." (Memo for the U.S., p. 7)

Furthermore, it is well settled that the granting of a § 5 application can be conditioned in whatever way necessary to satisfy the public interest. *Atlantic C. L. R.R. v. United States*, 48 F.2d 239 (1931), *aff'd*, 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932). This being the case, how can the Commission fail to impose a condition which would result in giving effect to the obvious intention of Condition 24(a). The importance of this condition was stated by this Court when it said that Milwaukee's "past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon . . .". *Northern Lines Merger* cases, 396 U.S. 491, 515.

The balance of the Interstate Commerce Commission's Motion to Affirm adds nothing which has not previously been dealt with in this Brief in Opposition.

CONCLUSION

For the foregoing reasons, appellants urge that probable jurisdiction should be noted.

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IN THE

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October Term, 1970

No. ~~000~~ 70-31

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v.

UNITED STATES OF AMERICA, *ET AL.*,
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IN THE

Supreme Court of the United States

October Term, 1970

No. 903

PORT OF PORTLAND, *ET AL.*,
Appellants,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLANTS

Opinion Below

The order and judgment of the three-judge Court for the District of Oregon is not reported and is reproduced in the Appendix (pp. 9-10). The report and order of the Interstate Commerce Commission (Commission or ICC) is published as *Spokane, Portland & Seattle Ry. Co. and Union Pacific R. Co.—Control—Peninsula Terminal Company*, 334 I. C. C. 419, decided June 6, 1969, and is also reprinted in the Appendix (pp. 11-68).

Jurisdiction

The judgment of the district court was entered on July 9, 1970, and appellants filed notice of appeal on September 1, 1970. This appeal was docketed on October 26, 1970, and probable jurisdiction was noted on February 22, 1971.

Questions Presented

1. Whether, in approving the acquisition of control (pursuant to § 5(2) of the Interstate Commerce Act) of a terminal railroad by two trunkline railroads without including two competitive railroads, the Commission applied erroneous legal standards in the following respects:

(1) By limiting its consideration to one small part of the territory involved, ignoring the rapidly growing, transportation needs of an adjacent area which is part of the same metropolitan district;

(2) By concluding that the applications of the two competitive railroads in the territory could not be granted because to do so would give every railroad in the area grounds for seeking to serve the customers of all other railroads in the area; and

(3) By concluding that direct service by the two competitive railroads to the terminal railroad's industries would constitute an "invasion of the joint applicants' territory."

2. Whether the Commission's failure to include the Milwaukee Railroad in the proposed transaction is inconsistent with the basic requirement approved by this Court in the *Northern Lines Merger Cases*, 396 U. S. 491 (1970), that the Milwaukee be given the right to serve "all present and future industries at Portland."

3. Whether the Commission applied an erroneous standard of law in narrowly construing § 3(5) of the Interstate Commerce Act as requiring applicants for common use under that section to demonstrate that they are already entitled to serve the terminal facilities which they seek to reach.

Statutes Involved

There are set forth in Appendix A to this brief pertinent portions of the Interstate Commerce Act (the Act) involved in this appeal, §§ 5(2) (a) to (d), inclusive, 5(11), 3(4) and 3(5), 49 U. S. C. §§ 5(2) (a) to (d), inclusive, 5(11), 3(4) and 3(5), and the declaration of the National Transportation Policy stated in the preamble to the Interstate Commerce Act, 49 U. S. C. preceding § 1.

Statement

Rivergate Industrial District (Rivergate), a land area of nearly 3,000 acres and the last major acreage available in metropolitan Portland, Ore., is owned and under active development by the Port of Portland, a municipal corporation created in 1891 by the Oregon State Legislature. Lying strategically at the confluence of the Columbia and Willamette Rivers, Rivergate has about six miles of waterfront on the Columbia-Willamette system, the second largest river improvement in the United States. Substantial public monies have already been spent on the development, and the ultimate public and private investment is expected to exceed $500 million (App. 217-18, 227-29, 388).

The controversy before the Court concerns rail service to Rivergate by the four railroads serving Portland, Union Pacific Railroad Company (UP or Union Pacific), Spokane, Portland and Seattle Railway Company (SP&S),

Southern Pacific Transportation Company (SP or Southern Pacific) and Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee).[1]

By application filed July 25, 1967, SP&S and Union Pacific (joint applicants) sought authority to acquire control of Peninsula Terminal Company (Peninsula) through purchase of its entire capital stock in equal shares under § 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2). Peninsula is a small independently owned terminal railroad about 3.79 miles in length located at North Portland, Ore., adjacent to Rivergate. In their application, the joint applicants state (App. 143-44):

> . . . [T]he River Gate Industrial Area in North Portland being developed by The Port of Portland Commission lies approximately one-half mile to the west of Applicant's physical connection to Peninsula. The northeasterly portion of said area is now reached by the western terminus of the tracks of Peninsula, and proposed acquisition will enable Applicants to provide rail service to said industrial area over the lines of Peninsula. . . . .
>
> No major changes in traffic or revenues are anticipated in the immediate future; however, it is anticipated that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of the said River Gate Industrial Area by The Port of Portland Commission.

[1] At the time of the hearings in early 1968, the Milwaukee was not serving Portland directly, but extended its operation to the area on March 22, 1971 as a result of the condition attached to approval of the Northern Lines merger. Northern Lines Merger Cases, 396 U. S. 491 (1970), aff'g Great Northern Pacific & Burlington Lines, Inc.—Merger, Etc.—Great Northern Railway Company, 331 I. C. C. 228 (1967), 331 I. C. C. 869 (1968). Burlington Northern Inc. has succeeded SP&S as a result of the Northern Lines merger.

Rivergate is being developed by the Port of Portland and already has located within its boundaries five industries, four on the Willamette River or west side and the fifth on the Columbia River or east side. A schematic map showing the locations of the various facilities here involved is attached at the end of this brief. Peninsula's facilities on the east side provide one of two possible rail access routes to Rivergate. The other route on the west side extends from UP's Barnes Yard (No. 9 on the map) over a track jointly owned by UP and SP&S to the Rivergate property line where it connects with the Port's track to the industrial properties. The Port owns all tracks within Rivergate except those on industry owned property. UP now provides rail service for the account of itself and Burlington Northern over these facilities. If the proposed transaction is approved without inclusion of SP and Milwaukee, direct rail service to Rivergate will be restricted to the two joint applicants.

Subsequently, the Milwaukee and the Southern Pacific each sought inclusion as equal owners in the proposed transaction pursuant to § 5(2) (d) of the Act, 49 U. S. C. § 5(2) (d). In their petitions for inclusion, Milwaukee and Southern Pacific each requested also the grant of the use of certain trackage so as to provide direct access to and from Peninsula. Milwaukee also requested common use of intervening interchange tracks at North Portland as terminal facilities under § 3(5) of the Act, 49 U. S. C. § 3(5).

SP (shown in orange on the map) comes into Portland from the south and has an interchange with UP at East Portland (No. 5 on the map) and with the Burlington Northern at Hoyt Street (No. 3 on the map). As agent for UP, SP now takes its cars to and from UP's Albina

Yard (No. 6). The right to use tracks sought by SP extends from East Portland (No. 5) to the UP and BN connections with Peninsula at North Portland (No. 7). The distance over UP from the North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. (App. 407, 399.)

In separately filed applications at ICC Finance Docket Nos. 24890 and 24891, Southern Pacific sought authority requiring common use of the terminal facilities of Peninsula and use of the Union Pacific's main line tracks from the SP-UP track connection at East Portland, Ore., to the tracks of Peninsula in North Portland, and, in the alternative, the common use of the terminal facilities of Union Pacific between Peninsula and the SP-UP connection at East Portland.

The several applications and petitions were heard on a consolidated record before a hearing examiner at Portland from February 26 to March 1, 1968, inclusive. The public bodies (the Port of Portland and Sam R. Haley, Public Utility Commissioner of Oregon, both appellants here), intervened and presented extensive evidence to protect the public interest in providing Rivergate with adequate, efficient and economic rail service by the four linehaul railroads serving Portland, namely, Burlington Northern (SP&S), Union Pacific, Southern Pacific and Milwaukee.

On September 24, 1968, in a 65-page report (App. 69-135), the hearing examiner recommended approval of the acquisition of control proposed by SP&S and UP subject to conditions providing for (1) inclusion, as equal owners, of Southern Pacific and also Milwaukee upon consummation of the Northern Lines merger and the filing by Milwaukee of an application to extend its operation to Portland and (2) the right of access by Southern Pacific and Milwaukee

over certain trackage to reach Peninsula. The examiner also recommended approval of the Southern Pacific's § 3(5) applications (Finance Docket Nos. 24890 and 24891) providing for common use by Southern Pacific of tracks and facilities of Union Pacific for operation between the UP-SP connection at East Portland and the Peninsula tracks at North Portland.

After the filing of exceptions to the examiner's recommendations and replies thereto, the Commission, by Division 3, approved acquisition by SP&S and UP of control of Peninsula through purchase of all its capital stock and denied the authority and the relief sought by Southern Pacific and Milwaukee. *Spokane, Portland & Seattle Railway Co. and Union Pacific Railroad Co.—Control—Peninsula Terminal Co.*, 334 I. C. C. 419 (1969).

Petitions for reconsideration were filed by the Port, the Oregon Commissioner, Southern Pacific, Milwaukee and Crown Zellerbach Corporation, an affected shipper. On October 24, 1969, Division 3, acting as an Appellate Division, denied the several petitions. Thereafter petitions were filed to take the case to the entire Commission. These petitions were denied by order dated November 21, 1969.[2] Suit was then filed by the Port and the Oregon Commissioner in the United States District Court for the District of Oregon, where the other appellants here intervened as plaintiffs.

The United States, the nominal defendant, filed a brief supporting plaintiffs and participated in the hearing. It contended that the Commission's decision should be set aside and the action remanded to the Commission for correction of errors committed.

[2] On December 8, 1969, the Commission postponed the effective date of its order of June 9, 1969, authorizing the proposed transaction until further order.

Throughout this period, the *Northern Lines Merger Cases* were in the course of decision. On November 20, 1968, the United States District Court for the District of Columbia affirmed the ICC's approval of the merger which the Commission made subject to Condition 24(a) providing for the Milwaukee's ultimate entry to Portland upon consummation of the merger. *United States v. United States*, 296 F. Supp. 853 (D. D. C. 1968). Then on February 2, 1970, prior to the hearing before the District Court in the present case, this Court affirmed the merger in *Northern Lines Merger Cases*, 396 U. S. 491.

On July 9, 1970, after the filing of briefs and after hearing the parties here involved, the Oregon District Court entered its two paragraph order and judgment in which it made a finding that the Commission's report and orders are supported by substantial evidence and are neither arbitrary nor capricious, affirmed the orders of the Commission, and dismissed the action without opinion. (App. 9-10.)

Appellants in this Court are the Port of Portland, the Oregon Public Utility Commissioner, Southern Pacific and Milwaukee. All join in this brief, though an additional brief directed primarily at one aspect of this litigation, is also being filed by Milwaukee.

ARGUMENT

Summary

1. This case involves interpretation of §§ 5(2) and 3(5) of the Interstate Commerce Act. The basic application was filed under § 5(2). The test under that section is whether the proposed transaction will be consistent with the public interest. Appellants submit that the Commission's determination of the public interest is defective in several respects, and that, accordingly, the district court's judgment affirming the Commission's decision should be reversed and the case remanded.

A. The hearing examiner recommended that all four railroads be included in the § 5(2) transaction. He further recommended that SP and Milwaukee be given access to Peninsula and that SP's common use applications under § 3(5) be granted. The Commission, however, reversed all these recommendations and concluded that control of Peninsula should be limited to UP and SP&S. Central to these differing results is the fact that the hearing examiner considered Portland to be the relevant transportation area, whereas the Commission limited consideration to Peninsula, a small part of the Portland area.

By so doing, the Commission ignored what this case is all about—rail service to Rivergate, a 2,942 acre port and industrial complex which is being developed by the Port of Portland and, which, when fully developed, is expected to generate 5,000,000 tons of rail freight annually. The Commission neglected to consider the public benefit which would flow from direct access to Rivergate by all Portland linehaul railroads. In short, the Commission failed to take into account all relevant factors affecting the public interest.

B. The Commission's denial of the requests for inclusion by SP and Milwaukee was in large part based on its conclusion that if it allowed those lines in, it "would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads." This conclusion is wholly without foundation. The proceeding here is based on an application for approval of acquisition of control under § 5(2) and on the Commission's power under that section to impose whatever conditions are "just and reasonable" or to include other railroads when in the "public interest." These are the grounds on which SP and Milwaukee seek inclusion and access, not the fact that they are "present" in Portland. Moreover, it should be emphasized that all that Milwaukee and SP seek to obtain in this proceeding is direct access to Rivergate. Authority to serve other parts of Portland would require the institution of additional proceedings and would afford the Commission adequate opportunity to deal with that situation if and when it arises.

C. The Commission found that direct service by SP and Milwaukee to Peninsula would constitute an "invasion of the joint applicants' territory." In so finding, the Commission assumed that UP and SP&S, by connecting with Peninsula (an independent terminal carrier), acquired an exclusive right to serve Peninsula's industries. This assumption is invalid, is contrary to decisions under other sections of the Act, and wholly ignores the competitive situation at Portland as it relates to Rivergate.

2. One of the conditions imposed in the *Northern Lines Merger Cases* was that the Milwaukee be permitted to extend its operations to Portland and that it be granted trackage rights over Burlington Northern, including "the

right to serve on an equal basis all present and future industries at Portland." This condition was critical to administrative approval of the Northern Lines Merger and to ratification of that action by this Court. Yet the Commission's exclusion of Milwaukee in this proceeding is in direct conflict with the condition.

3. Under § 5(11) of the Act, in passing on a § 5 transaction, the Commission is required to consider anticompetitive effects. However, in this case, the Commission wholly failed to discharge its obligation in this respect, making no attempt whatever to inquire into the effect of the proposed transaction on competitors or on the shipping public.

4. The Commission rejected applications by SP and Milwaukee under § 3(5), construing that section as requiring the applicants to show that they are already "entitled to serve" the particular terminal facilities which they seek to reach. This restrictive interpretation of § 3(5) is contrary to the language of the statute and to the Commission's own decisions in other cases.

1. The Commission applied erroneous legal tests in determining the public interest.

Under § 5(2) of the Act, 49 U. S. C. § 5(2)(a), one railroad or two or more jointly may acquire control of another railroad through purchase of its capital stock with the approval and authorization of the Commission as provided in subparagraph (b). That subparagraph provides for the filing of an application with the Commission, and approval of a proposed transaction is granted if the Commission finds that the proposed transaction will be consistent with the public interest.

As related to rail unifications and acquisitions of control under § 5(2) of the Act, this Court in *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25 (1932), said that the term "public interest"

> is not a concept without ascertainable criteria, but has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

The key to the intense interest shown by so many parties in this proceeding is the presence and the present and future development of the publicly owned industrial area called Rivergate. Adequate rail service to Rivergate is a matter of absolute necessity for its full development. In determining the public interest, the ICC not only failed to give adequate consideration to Rivergate and its needs but also followed other erroneous legal standards in its determination of the public interest. These matters we consider in the next three subsections.

A. The Commission erred in limiting its consideration to Peninsula.

In its decision, the Commission refers to the hearing examiner's consideration of the entire Portland territory as "an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity." In his view, "divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area" (App. 116-17). The Commission's conclusion is that it would "consider Pen-

insula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor" (App. 30). This narrow view, we respectfully urge, totally disregards the great public interest in the development of Rivergate as a key project in the present and future commercial and industrial development of Portland, the State of Oregon, and in truth the Pacific Northwest.

Portland, a major deep-channel seaport, transportation and distribution center, serves the Pacific Northwest as well as the continental United States. Rivergate is a vital part of the future industrial and economic development of the area (App. 220-32, 215-16). Peninsula, the terminal carrier to be acquired, is, in the words of the hearing examiner, a "potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings" (App. 74) Rivergate lies partly within, and partly adjacent to, the city of Portland. Burlington Northern (SP&S) and UP each describe the Portland Switching District as including both North Portland and Rivergate. Rivergate is also within the Portland Commercial Zone established by the Commission for motor carriers under Part II of the Interstate Commerce Act. (App. 343-45, 348, 351-56, 212.)

Additionally, from the standpoint of railroad operations, UP and Burlington Northern (SP&S) switch cars to and from North Portland for interchange with Peninsula. There, like several other terminal railroads in the Portland Switching District, Peninsula provides the switching between its connection with the Portland trunklines (North Portland) and its on-line industries.[3]

[3] Peninsula is the only terminal railroad at Portland not owned by trunk lines serving Portland at the time of the hearings. The other terminal lines are Portland Traction Company and Portland Terminal Company, both shown on Dench's sketch map (App. 331, 343-345, 355-56).

The Commission, appellants submit, should have considered Peninsula as a switching facility forming an integral part of Portland Terminal Area and Switching District and particularly as a potential means for serving Rivergate and the industries now and later located there. It should have determined how Rivergate's rail service can be best provided in the public interest and how Peninsula can be best utilized by and in conjunction with the Portland trunk lines to accomplish this function.

Rivergate's importance permeates the record.[4] Its waterfront properties permit the use of the 100-mile channel connecting the Port of Portland with the Pacific Ocean. Oceanborne traffic moves in large volume through the Port, and there is great potential for additional water traffic. (E.g., App. 207-11, 215-16, 218, 220-27, 230-32, 240-42, 405.)

Traffic estimates for Rivergate are presented by the Port's consultant, and no evidence in opposition to his estimates was presented. At full development, 500-600 freight cars per day will be handled to, from, or within Rivergate. Translated to volume measures, this means a movement of 40,000 tons of rail freight as a weekday maximum or 20,000 tons per day as a weekday average. The volume will eventually reach 5,000,000 tons of rail traffic annually (App. 207-8). Even today, Rivergate is generating substantial traffic, and the district is developing apace.[5]

---

[4] In the Northern Lines Merger Cases, this Court observed that Milwaukee's past failure to become a meaningful competitor came in large part because its lines did not reach Portland or the southwest terminal of the Northern Lines in California. 396 U. S. at 515.

[5] The development of Rivergate is thoroughly discussed in petition filed by the Port of Portland for reconsideration and further hearing before the Commission. This petition filed August 5, 1969, is part of Volume II of the documents filed with the ICC as certified by the Commission's Secretary.

Significantly, the Commission, in determining the public interest, did not discuss the huge traffic potential at Rivergate and erroneously concluded to consider only Peninsula Terminal as it now exists. Thus we find that the Commission considered not Rivergate's present and potential traffic, but Peninsula's declining traffic (3,640 loaded cars in 1966 and 2,748 cars in 1967) and the share of that traffic handled by Milwaukee and SP through connections and the use of joint rates and through routes (App. 31).

The needs of Rivergate shippers and of the shipping and consuming public and how each of the proposals before it would affect the rail competitive situation should have dominated the Commission's consideration of the issues. Throughout the proceeding, the public bodies have urged that Rivergate is not the captive province of any one or two railroads, but is an open public facility under development by the Port. Its maximum development as a major industrial and freight interchange area requires economic, fast and reliable freight service provided by all the Portland line-haul railroads individually and as a group. If, indeed, the Commission had considered the effect of the proposed transaction upon adequate transportation service to the public as required by § 5(2)(c) of the Act, the Court would find in the Commission's decision consideration of the rail routes and service available to Rivergate shippers, the switching situation in the terminal area of Portland and its relation to Rivergate, the provision of facilities permitting modern rail service to Rivergate as it develops, car supply, competition among the railroads, and other matters bearing on the adequacy of rail service. Because of its refusal to consider Rivergate in determining the public interest, the Commission's decision is necessarily silent on these matters.

The record, however, shows that direct access to and from Rivergate by all Portland linehaul railroads, including Milwaukee, makes possible adequate and efficient rail service by eliminating delays, by enabling the use of the new rail technologies, by providing healthy competition, and by maximizing the number of single-line or single-carrier routes to and from Rivergate. If the four Portland railroads become the joint owners of Peninsula, single-line routes will be available to and from almost every point in western United States producing or receiving Portland/Rivergate traffic; competitive routes and service will be available to Rivergate shippers throughout the area west of Chicago and along the West Coast. (App. 319, 321, 204-6.) For example, shippers and receivers in northern and central California, Arizona, New Mexico and Texas will have direct, single-line service to and from Rivergate. The Commission in its decision lists the states in which the Portland railroads operate (App. 16-17), but does not discuss either the additional single-line service provided or the competition among these railroads.

If SP and Milwaukee jointly own and have direct access to Peninsula, single-line coverage will be greatly expanded, all to the benefit of the public, and it can be truly said that Rivergate as a public facility will have available to shippers located there comprehensive and competitive rail service necessary for its proper development.

In *Chicago & N. W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I. C. C. 285 (1960), as well as in other decisions, the Commission recognized the benefits of single-line service at page 294:

> The single-line haul makes available a wider source of supply for transit shippers in this service area, reduces time consuming and costly interchanges, and provides greater flexibility in rate making—all to the benefit of the public generally.

The public need for direct access to all the Portland railroads is clear from the testimony of various shippers in the proceeding. These included Collier Carbon and Chemical Corp., a chemical company; Crown Zellerbach Corp., the second largest producer of paper and paper articles in the nation; and Oregon Steel Mills, the first steel plate mill in the northwest which was in course of construction at the time, time of the hearings. The examiner fairly abstracts their testimony in detail (App. 105-9), but the Commission treats this evidence in a somewhat slighting fashion in its decision (App. 21, 31-33, 61-65). The important point overlooked by the Commission is that these were *Rivergate* shippers supporting the need for direct service to Rivergate by Southern Pacific through the Peninsula gateway. The Commission lamely dismisses their testimony, but there is nonetheless unrefuted proof that direct service to Peninsula would result in wider single-line service, less switching of cars, less handling of freight, less likelihood of damage, less time in transit and in terminals, and easier tracing of shipments.

Furthermore, from the Port's point of view, SP's exclusion from Rivergate presents difficult handicaps for its development. In this respect, the Southern Pacific's manager of industrial development considered a direct connection by SP with Peninsula a necessity if it expects to locate industry in Rivergate. He said (App. 509-10):

> Q. Now, if the Southern Pacific has the right to connect directly with the Peninsula Terminal Railroad, would the Southern Pacific under those circumstances attempt to locate industry in the Rivergate area?
>
> A. Yes, it would.
>
> Q. Would you state why that would be so?
>
> A. The Rivergate Industrial area is unique in many ways. First, here we have an area in the close

proximity of a metropolitan area which contains several thousand acres of industrial property uniquely located on deep water and in addition it is publicly owned. We feel that the success of such a large industrial development will largely depend upon the flexibility which is given as far as rail service is concerned. I think we must recognize here that some of the major markets served, to be served by the industrial production and industrial growth of the Rivergate area will be in California and the Southwest areas which are served by the Southern Pacific lines. Therefore, we feel that the success of the area, the Rivergate area will be largely dependent upon S. P. service being given.

Q. Now, if the Southern Pacific does not have direct access to the Peninsula Terminal would that same incentive be present for the locating of industries in the Rivergate area by Southern Pacific?

A. No, it would not.

Q. Would you explain why not?

A. Well, the basic one is that by having direct service to the Rivergate area we know what kind of service we can give to the industries, we can assure them of a specific service and the service they need by not having that access obviously we cannot assure them of that service and we would not feel as strongly about locating industries there.

SP&S's traffic manager on cross examination confirmed the view of SP's manager of industrial development (App. 436):

Q. If a railroad did not have direct access to the Rivergate area in your view as an expert traffic man, would they have the same incentive for . . . locating industry in the Rivergate area?

A. I doubt it.

The Commission refused to consider this evidence just as it refused to consider evidence relating to Rivergate's importance, its traffic potential, its transportation needs, its rapid development and other factors bearing on the issues. Inclusion of SP and Milwaukee not only will assure the rail service needed by Rivergate shippers but will also promote the development of this important public facility.

By confining its consideration of public interest solely to Peninsula, the Commission thereby ignored the public benefits flowing from the improvements in rail service to Rivergate made possible by approval of the requests of Milwaukee and SP. The Port's consultant, Dr. E. Grosvenor Plowman, succinctly discussed terminal switching at Portland as it relates to Rivergate. An essential link in good rail service, he said, is the fast and efficient handling of trains and cars in terminal areas. The old fashioned method of uncorrelated transfer of freight cars from one carrier to another within the switching district will not provide Rivergate with the rail service it needs. Rivergate and North Portland where Peninsula operates are within the Portland Switching District. In terminal areas with complex switching such as Portland, the rhythm of one switching operation is so out of step with the next in the chain that a minimum of 24 hours is consumed for each transfer. Thus cross-Portland switching of cars may take as much as three to four days (App. 212-13).

Approval of the Milwaukee and SP requests makes possible not only the elimination of switching delays on their traffic to and from Rivergate, but also the use of the more advanced railroad technologies.

In this respect in the record here, Dr. Plowman testified (App. 209-10):

> Rivergate, a new facility with potential for all types of traffic, presents a major opportunity for use of new technology in rail terminal service. In fact, this new technology must be used if Rivergate is to realize its potential. Unit and semi-unit trains eliminate nearly all or a substantial part of the time wasted in terminals by freight cars and their cargo. In its ultimate form, the unit train of 100 or more specially designed cars moves loaded in one direction and empty in the other between two highly mechanized terminals. These terminals load and unload the never-uncoupled cars as they move slowly through the loading and unloading facilities. Under optimum conditions, the unit train moves directly through terminal areas to and from loading and unloading facilities without switching delays. Groups of cars in linehaul semi-unit trains require some terminal switching, but switching economies are available if the semi-unit train moves directly through terminal areas to and from tracks adjacent to the loading and unloading facilities.

The Commission's failure to consider relevant evidence pertaining to Rivergate springs from its refusal to evaluate all matters affecting the public interest. Portland is a city and a port of major commercial importance. It has a recognized metropolitan district. In the railroad world, it has a well established switching district within which lie Peninsula and Rivergate (App. 345, 351-52, 355). The Commission was duty bound to consider the interests of Portland as a transportation entity, Rivergate as a new area within the district, and Peninsula as the independent carrier to be acquired. The Commission has frequently held that in § 5 proceedings all matters of all kinds affecting the public interest should be considered.[6] In this case,

[6] For typical cases in which the Commission has considered the interests of all parts of the public in determining the public interest, see City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 I. C. C. 34, 36 (1962); Detroit, T. & I. R. R.—Control, 275 I. C. C. 455, 488 (1950); Watson Bros. Transp. Co., Inc.—Purchase—West Coast Fast Frt., 57 M. C. C. 745, 758 (1951); and Chicago, B. & Q. R. R. Control, 271 I. C. C. 63, 145-46 (1948). *Cf.* St. Louis SW Ry. Co.—Purchase—Alton & S. R. R., 331 I. C. C. 515, 538 (1968).

however, it has failed to give proper consideration to the public interest by ignoring Rivergate and its needs. It should be called upon to consider the public interest in all its aspects in the consolidated proceedings before it.

B. The Commission erred in concluding that inclusion of Southern Pacific and Milwaukee would provide grounds for every railroad in the Portland area to seek to serve the stations and industries of any or all other railroads in that area.

In support of its denial of the Milwaukee and SP requests for inclusion and access to Peninsula and its refusal to consider Rivergate, the Commission relied on an erroneous standard which destroyed fair and reasonable consideration of the issues. It said (App. 30, 334 I. C. C. at 432-33):

> We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within that undefined geographical area. *Cf. Nashville, C. & St. L. Ry. Construction,* 295 I. C. C. 363, 377. If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads.

For several reasons, this standard, which is basic to the Commission's conclusion, is erroneous and utterly without substance. First, neither Southern Pacific nor Milwaukee has claimed that inclusion in the proposed transaction or use of tracks for direct access to Rivergate should be granted because of their mere presence in Portland; nor have they contended that consideration of the Portland area in evaluating the public interest would open up all stations and industries on any or all other railroads in Portland.

The issues here spring initially from the requests of Southern Pacific and Milwaukee for inclusion in the proposed transaction under § 5(2)(d) of the Interstate Commerce Act. That section provides that in the case of a proposed transaction involving railroads under § 5(2), the Commission is authorized as a prerequisite of its approval of the proposed transaction to require, upon equitable terms, the inclusion of other railroads in the territory involved, upon petition by such railroads and upon a finding that the inclusion is consistent with the public interest. We should note also that under § 5(2)(b), 49 U. S. C. § 5(2)(b), the Commission is empowered to subject its approval of a § 5(2) proposed transaction to such terms and conditions as it finds to be just and reasonable, and consistent with the public interest.[7]

But whether a railroad proceeds through an inclusion petition under § 5(2)(d) or seeks terms and conditions pursuant to § 5(2)(b), a § 5(2) application must first be presented, and the Commission can then determine the question of inclusion and the imposition of reasonable terms and conditions. Under such a procedure prescribed by law, there certainly is no opportunity for shotgun terminal expansions.

Second, neither Southern Pacific nor Milwaukee requested the right to serve stations and industries on all railroads in the Portland area or in the Portland Switching District; nor has any appellant contended that such a right is sought in these proceedings or would result from approval of the SP and Milwaukee requests. The Commission was aware of the railroad requests. It summarized the Southern Pacific's requests as follows (App. 19, 334 I.C.C. at 425):

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[7] See Atlantic C. L. R. Co. v. United States, 284 U. S. 288, 294-295 (1932), aff'g 48 F. 2d 239, 244 (W. D. S. C. 1931) and M & M Transportation Co. v. United States, 128 F. Supp. 296, 298 (D. Mass. 1955), aff'd, 350 U. S. 857 (1955), for examples of the broad exercise of this power.

> . . . SP requests a condition to approval of the SP&S-UP application providing for its inclusion as an equal joint partner in the ownership of Peninsula and as a condition to such ownership, trackage rights over UP's main line and the terminal trackage between Peninsula and the SP-UP track connection at East Portland.

As to the Milwaukee, the Commission said (App. 18, 334 I.C.C. at 424):

> Contingent upon the extension of its operations to Portland pursuant to the *Northern Lines* case, Milwaukee requests joint and equal ownership of Peninsula's stock with the other trunklines and considers joint ownership of Peninsula essential to its Portland operations insofar as the industries located on Peninsula and in Rivergate are concerned.

Third, the granting of the Milwaukee and Southern Pacific requests will authorize no more than inclusion in the proposed transaction and direct access to Peninsula. There certainly is attached to that authority no right to serve any area other than Rivergate. If either railroad should seek authority beyond that requested, appropriate proceedings would have to be instituted or would ensue, and the Commission is clothed with ample power to deal with the Portland terminal situation and its rail service.

Nashville, C. & St. L. Ry. Construction, 295 I.C.C. 363 (1956), which the Commission cites in support of its "mere presence" theory, is not apposite to the situation here. *Nashville* involved an extension of a rail line for which authority was sought under § 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18). The question there was whether a short span of track was an extension of line or spur or industrial tracks exempt from certificate requirements under § 1(22) of the Act. The Commission referred

to the doctrine of *Texas & P. Ry. Co. v. Gulf C. & S. F. Ry. Co.*, 270 U. S. 266 (1926) holding that a short span of track, though like a spur or industrial track, may constitute an extension of line requiring certification. *Nashville* did not involve issues growing out of requested inclusion under § 5(2)(d) or conditions under § 5(2)(b) of the Act. It spoke of "mere presence" and "invasion of territory" in the context of a § 1(18) extension case. We shall speak to the "invasion" matter in the next subsection of the argument. But insofar as the present issues of inclusion and direct access are concerned, *Nashville* is not in point.

In sum, the Commission erroneously concluded that treatment of the entire Portland area as one transportation entity would in effect allow every railroad in the undefined Portland area to serve the stations and industries of any or all other railroads. This faulty conclusion based on an erroneous legal standard led to the Commission's gross and arbitrary misjudgment of the public interest.

C. The Commission erred in concluding that direct service by SP and Milwaukee to Peninsula's industries would constitute an invasion of the territory of the joint applicants (UP and Burlington Northern).

In the decision at issue, after determining to limit its consideration solely to Peninsula, the Commission proceeded to find that

> . . . since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicants' territory (App. 30, 334 I. C. C. at 433.)

Implicit in this conclusion is the assumption that UP and SP&S, by connecting with an independent switching

carrier, thereby acquire the right to serve the independent carrier's industries to the exclusion of all other railroads in the area. This assumption is invalid.

Any application for control of a carrier under § 5(2) of the Act constitutes a voluntary submission to the Commission's inclusion and conditioning powers. If the applicants do not wish to be subjected to the conditions imposed, they can simply refrain from consummating the transaction. The inclusion power and the corollary conditioning power to provide direct access are clearly intended to bring railroads operationally and otherwise into territories served by the carrier to be acquired. In this respect, except for the permissive character of an order approving control, inclusion/access cases are similar to applications by railroads for certificates authorizing the construction or extension of lines into areas served by other railroads. In that type of case, the law has long been settled that carriers have no legal right to exclusive occupancy of a territory. *Pennsylvania R. Co. v. United States,* 40 F. 2d 921, 925 (W. D. Pa. 1930); *Indian Valley R. R. v. United States,* 52 F. 2d 485 (N. D. Cal. 1931); *Chesapeake & O. Ry. Co. Construction,* 267 I. C. C. 665 (1947); *Oregon Short Line R. Co. Construction,* 282 I. C. C. 741 (1953).

Rivergate, the center of this controversy, is a development of the Port undertaken after thorough study at great expense. The land was bought and reclaimed over a period of nearly 30 years. Originally in large part low lying marshes subject to flooding at various times of the year, the area is being rapidly reclaimed and filled with spoil materials from the Port's dredging operations in the rivers. The Port owns all the railroad track within Rivergate and considers that the area is not the exclusive domain of any one or two railroads but is rather a public facility for

which the service of all four Portland railroads is required. (App. 227-28, 214-15, 203-4, 232.)

Considering the circumstances, the public bodies respectfully submit that neither Burlington Northern, Union Pacific nor Peninsula has any legal right to exclusive occupancy and access to Rivergate. Certainly neither Burlington Northern nor Union Pacific should be able to lock up Rivergate and gain an unjustified advantage at the expense of the public, Rivergate shippers and the taxpayers.

The Commission should have followed the rule that no carrier has a legal right to exclusive access to or occupacy of a territory.

Illustrative of the rule is *Pennsylvania R. Co. v. United States,* 40 F. 2d 921 (W. D. Pa. 1930), the district court affirmed the granting of a certificate of public convenience and necessity permitting the applicant railroad to serve a manufacturing area previously served by another railroad. The Court said at page 925:

> It is equally certain that the written law—the Transportation Act of 1920—does not explicity or implicitly accord a noncompetitive traffic area to the first taker as the law accords a trademark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in.

In the present situation, no party has seriously contested the Port's evidence concerning the huge traffic potential at Rivergate, and there is the voluminous evidence discussed above relating to the strong need for direct

access by all the Portland railroads to Rivergate. But, here again, we find that the Commission confined its consideration to Peninsula and specifically referred to "direct service to Peninsula's industries" in its discussion of the invasion question (App. 30, 334 I. C. C. at 433).

We emphasize that § 5(2)(c) of the Act requires the Commission to consider, among other things, "the effect of the proposed transaction upon adequate transportation service to the public." In this connection, the Commission refers to the rule that "a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized" (App. 31). *Cf. Northern Pacific Ry. Co. Construction,* 295 I. C. C. 281, 294 (1956) and *Minneapolis, St. P. & S. S. M. R. Co. Acquisition,* 295 I C. C. 787, 802 (1958). The Commission misapplies this rule.

The record contains a profusion of evidence concerning the deplorably poor quality of service to and from Peninsula industries. The Commission avoided any discussion of this evidence. Southern Pacific cars for Peninsula are handled in switching service between UP's Albina Yard and the North Portland interchange, a distance of 5.2 miles. A direct movement between Albina and the North Portland interchange can be made in about 45 minutes (App. 407). In fact, the average transit time was 30 hours or more. Witnesses for the joint applicants and others were in unanimous agreement that the transit time of 30 hours or more was not adequate service. The Commission does refer to evidence offered by three Rivergate shippers supporting SP, as well as evidence offered by SP and Milwaukee themselves, and concludes that it fails to establish that the joint applicants, through con-

trol of Peninsula cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically (App. 33, 334 I. C. C. at 435). Laying aside any question concerning this testimony by the Rivergate shippers and the fact that the testimony related to Rivergate, we respectfully submit that the Commission erroneously refused to consider the undisputed evidence that UP and SP&S are not providing adequate and efficient service to Peninsula. We turn to a brief review of that evidence.

UP's general manager admitted that it took about 30 hours for SP cars to move from Albina to the North Portland interchange (App. 398). UP's operating witness also concurred in the 30-hour transit time for the 5.2 mile movement (App. 577). Using a 10 percent random sample, Ordway's Exhibit 45, presented by SP, indicates that the elapsed time between Albina and the North Portland interchange exceeded the transit time of 30 hours conceded by UP's witnesses. (App. 315-17).

Other witnesses called by joint applicants agreed that the Albina-North Portland service was inadequate. SP&S's vice president and general manager said frankly that as an operating man he would not be satisfied with transit time of over 24 hours for a movement of six miles (App. 366). Its traffic manager testified (App. 431):

> Q. Is it your belief that 30 hours or more to from Albina to the North Portland interchange is adequate service to the public?
>
> A. I think any railroad man would like to improve it.
>
> Q. Will you answer my question, do you believe that is adequate service to the public?
>
> A. No, sir.

A representative of the Brotherhood of Railway Clerks said that he certainly did not consider "30 hours a reasonable time and adequate service to move cars a distance of about 5.2 miles" (App. 552). A receiver of freight located on Peninsula testified that he did not consider transit time of 37 hours from the time UP received a specific car to interchange with Peninsula as being adequate service for a distance of 5.2 miles (App. 488-89).

In his report, the examiner referred to "the almost incredible 30-hour transit time required for car movements between Albina Yard and Peninsula" (App. 123). He said that "the 30 hour transit time remains unsatisfactory, and greater efforts in the public interest must be found to expedite movements between those points" (App. 123-24).

The Commission arbitrarily disregarded the clear evidence of admittedly inadequate service for the transportation of present traffic to and from Peninsula. Thus its finding relating to adequacy of service in the territory is without a rational basis.

In brief, apart from its failure to consider Rivergate, the Commission has erroneously and arbitrarily applied the law relating to invasion of territory, protection of existing carriers (UP and BN), and the effect of the proposed transaction on service. These errors reflect also its failure to consider the rail competitive situation at Portland as it relates to Rivergate. This aspect of the case we consider in the next two points of this argument.

2. The Commission's refusal to implement the Portland Condition in the Northern Lines Merger Cases is arbitrary, erroneously excludes the Milwaukee from direct access to the Rivergate Industrial District, and nullifies an essential basis on which this Court approved the Northern Lines unification.

In *Northern Lines Merger Cases*, 396 U. S. 491 (1970), this Court had before it orders of the Interstate Commerce Commission approving the unification of the so-called Northern Lines and three subsidiaries, one being the SP&S, into Great Northern Pacific & Northern Lines, Inc. (now called Burlington Northern Inc.). The ICC first disapproved the proposed unification, 328 I. C. C. 460 (1966), but later, on reopening, authorized it, 331 I. C. C. 228 (1967). Between the Commission's first and second decisions, the Northern Lines and the Milwaukee arrived at an agreement (App. 332-37) which ultimately resulted in Condition 24(a) attached by the Commission to its approval of the proposed unification (App. 22-24, 326-28).

Condition 24(a) requires Burlington Northern (called NuCo in the Merger Cases) to permit the Milwaukee, upon its application, to extend its operations to Portland and to grant Milwaukee trackage rights to operate over Burlington Northern lines between Longview Junction (the end of the Milwaukee line at that time) and Portland "including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries."

Condition 24(a) was critical to the administrative and judicial approval of the Northern Lines unification. Speaking of "the newly designed competitive posture of the Milwaukee" in the *Northern Lines Merger Cases*, this Court said (396 U. S. at 516):

> The conditions imposed by the Commission's Second Report will alter that situation and substantially enlarge the Milwaukee's competitive potential between St. Paul and Minneapolis and the West Coast due to enlargement of its long-haul capability. Shippers will be afforded more flexible service. Another condition attached to the Commission's approval will permit the Milwaukee to run lines from its present western terminus into Portland, giving it a link with the Southern Pacific. All this will enable the Milwaukee to complete with the Northern Lines for east-west traffic and some north-south traffic as well as linkage with Canadian carriers to the north, which was previously the exclusive domain of one or both of the Northerns.

In short, the Commission imposed Condition 24(a), and this Court considered that it did so to make the Milwaukee a meaningful competitor of the Northern Lines. Yet in the case at bar, the Commission has refused to consider inclusion of Milwaukee in the proposed acquisition of control of a terminal line which could serve as a gateway to a new area of great present and potential traffic, and this at Portland where Milwaukee is a struggling newcomer. Without reference to any question of multicarrier ownership of interchange tracks at North Portland, the Commission could and should have ordered the Milwaukee's inclusion in fulfillment of the condition it attached to its approval of the Burlington Northern merger. The Comission's error is compounded by the brutal fact that Milwaukee is urgently in need of all the traffic it can generate.

Milwaukee will be filing with this Court a separate brief in support of its position. This brief statement of the Milwaukee situation is nonetheless sufficient to show that the Commission erred in failing to implement here the merger condition intended to make Milwaukee a meaningful competitor in the West.

3. The Commission erroneously failed to evaluate the competitive effect of excluding Southern Pacific and Milwaukee from the proposed transaction.

Section 5(11) of the Interstate Commerce Act, 49 U. S. C. § 5(11), relieves carriers and individuals participating in a § 5 transaction approved by the Commission from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as many be necessary to enable them to carry into effect the transaction.

The classic case interpreting § 5(11) is *McLean Trucking Company v. United States*, 321 U. S. 67, 87 (1944), in which the Court considered the antitrust aspects of that section. The Court concluded that

> . . . the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the antitrust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.
>
> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.

In the *Northern Lines Merger Cases*, *supra*, 396 U. S. at 504, this Court quoted the four factors in § 5(2) (c) which the Commission must consider in determining the public interest. It then said that

> . . . the Commission must also consider the anticompetitive effects of any merger or consolidation, because under § 5(11) of the Interstate Commerce Act any transaction approved by the Commission is relieved of the operation of the antitrust laws. *McLean Trucking Co. v. United States*, 321 U. S. 67, 83-87 (1944).

In its decision in the case at bar, the Commission made no effort whatever to inquire into the anticompetitive effect of the proposed transaction and on the general rail competitive situation in the West. Exclusion of Milwaukee and SP from Rivergate will deny to the shipping public the many benefits of competition between the railroads. Portland as an ocean port depends on inland traffic between competitive points as well as to and from local points served by the railroads reaching Portland. Likewise, Rivergate as a port and industrial facility of great capacity needs competitive rail service of high quality and wide coverage if it is to fulfill its public function as a viable instrument of commerce. The west entrance to Rivergate from Barnes Yard is now limited to UP and Burlington Northern. An east entrance through Peninsula would be likewise restricted under the Commission's decision. Such a result would plainly discourage Milwaukee and SP from developing Rivergate traffic, and competitive service would be effectively hampered. On the other hand, competition between the four trunkline railroads would assure to the public using Rivergate the many benefits of competition—good service between competitive points, good service to and from local points, the advantages of single-line service, wide choice of routes, the development of service and rate innovations, and the like. Access to new traffic generated at Rivergate can undoubtedly help to make Milwaukee a more effective competitor of the Northern Lines.

Moreover, in the rapidly changing railroad economy now in the course of reconstruction throughout the nation and in the West, the competitive position of Milwaukee and Southern Pacific *vis-a-vis* the Northern Lines and Union Pacific in the present situation should also be considered. The Commission, however, did not evaluate the anticompetitive effects of its decision in any respect.

The Commission's nonfeasance therefore calls for reversal.

4. The Commission's rejection of common use of terminal facilities pursuant to § 3(5) of the Interstate Commerce Act was based on an erroneous conclusion of law.

Thus far we have referred only to the Burlington Northern/Union Pacific application filed pursuant to § 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2). We have shown above that the Commission acted erroneously in granting that application without providing that appellants Southern Pacific and Milwaukee be included as equal owners of Peninsula and granted access to the lines of Peninsula.

In addition to the § 5(2) application, common use applications were filed by appellants Southern Pacific and Milwaukee under § 3(5) of the Act (App. 170-74, 180-83). From the point of view of the shipping public, the effect of granting the § 3(5) applications would be precisely the same as imposing access conditions pursuant to § 5(2). In both cases the result would be increased competition and availability of service by four railroads to Rivergate.

It is appellants' position that both types of relief should be granted. This is because, as the Commission recognized (App. 20, 334 I. C. C. at 425), authorizations under

§ 5(2) are permissive; if the applicants decide that the conditions imposed are too onerous, they may decline to consummate the transaction. Orders under § 3(5), on the other hand, are mandatory. Accordingly, if it is determined that all four railroads should have access to Peninsula, the only way the shipping public can be adequately protected is by coupling conditions under § 5(2) with an order under § 3(5).

The Commission disposed of the § 3(5) applications in one paragraph. It found (App. 34, 334 I. C. C. at 435-36):

> The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. *Cf. Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I. C. C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I. C. C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location. In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use. (Footnote omitted.)

We point out first that the Commission's conclusion that SP is "not entitled to serve Peninsula or Rivergate" seems inconsistent with other findings made by the Commission. Thus in ruling on its power to impose conditions on § 5(2) authorizations, the Commission found (App. 25-26, 334 I. C. C. at 429):

> We do not agree with the joint applicants' contention that because SP and Milwaukee do not physically connect with Peninsula, they are not "railroads in the territory involved" within the meaning of section 5(2)(d), and, therefore, that we lack jurisdiction to require their inclusion in the title proceeding.

If SP and Milwaukee are "railroads in the territory involved," then it would seem to follow that they are "entitled to serve" Peninsula.

However, even assuming *arguendo* that the Commission correctly concluded "SP is not entitled to serve Peninsula or Rivergate," we submit that the Commission's rejection of the § 3(5) applications on this ground was erroneous as a matter of law.

Section 3(5) reads as follows:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. . . .

In essence the provision states that the Commission has the power to require the use of "terminal facilities, including main-line track or tracks for a reasonable distance out-

side of such terminal, of any common carrier by railroad, by another such carrier or other such carriers . . ." It does not say that the other carrier (or carriers) must also be "entitled to the enjoyment of [the] terminal facilities." The term "other *such* carrier" refers only to the preceding phrase, indicating that the other carrier must also be a "common carrier by railroad."

By limiting consideration to Peninsula, rather than a broader geographic area, the Commission apparently reads § 3(5) as meaning that relief under that provision is only available if the railroad is already "entitled to serve" the particular terminal facilities which it seeks to reach. This narrow interpretation renders the provision of extremely limited application and is at variance with the plain language of the statute. Although the Commission refers to the "intent of Congress," it cites no legislative history to support its interpretation, and we can find none.

The only authorities cited by the Commission are two of its own decisions, neither of which squarely supports the Commission's conclusion. Indeed one of the cited cases, *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I. C. C. 1 (1965), is in our view solid authority for the opposite proposition.

That case involved an application by Seaboard under § 3(5) for the right to operate over trackage of Florida East Coast Railway Company in order to reach the terminal facilities of the Dade County (Miami) Sea Port Department. Florida East Coast contended that the only terminal facilities involved in the case were those owned by the Sea Port Department, which facilities Florida East Coast neither owned nor was entitled to enjoy, and thus that the trackage over which rights were sought were not terminal facilities as used in § 3(5) of the Act. The Commission,

however, rejected this argument and granted the relief requested. This action was affirmed by a three-judge court in *Florida East Coast Ry. Co. v. United States*, 256 F. Supp. 986 (M. D. Fla. 1966), aff'd *per curiam*, 386 U. S. 8 (1967).

The factual situation in the *Seaboard* case was strikingly similar to the factual situation involved here. The Commission's decision shows: that the facilities sought to be served were new port facilities, publicly owned and being constructed with public funds (327 I. C. C. at 2, 4); that it had always been the intention of the Sea Port Department that all railroads serving the area would have direct access to the port and that each carrier would be in a position to serve the port with its own equipment (*id.* at 4); that service at the port by both carriers was generally favored by the shippers (*id.* at 5); that the movement proposed over the trackage of Florida East Coast was a "straight-through movement without service to intermediate points" (*id.* at 7); that the interchange agreement proposed by the Florida East Coast did not provide adequate service because of delays and increases in switching costs (*id.* at 8); and that Florida East Coast claimed operation by Seaboard over East Coast's tracks would cause congestion (*id.* at 6). As mentioned, the requested relief was granted.

The Commission claims that this case is not applicable to this proceeding since Seaboard, the railroad seeking to acquire the common use rights, had been serving the port in its old location and thus when the port was moved to a new location which Seaboard did not serve, granting it the right to serve the new location did not constitute an invasion of another railroad's territory. (App. 34, 334 I. C. C. at 435, n. 11). Appellants submit that this is a

specious argument at best. Under the Commission's theory, whenever an industry with numerous track facilities located exclusively on railroad *x* decides to move its location to an exclusive point on railroad *y*, then railroad *x* could claim that it is entitled under § 3(5) as a matter of law to reach the new industry location over the tracks of railroad *y*. This is not the law.

Other decisions by the Commission also support the proposition that § 3(5) relief can be granted even though there have been no past rights or past ownership in the area sought to be reached. Thus in *Erie R. Co. Acquisition*, 275 I. C. C. 679 (1950), the Erie sought authorization to acquire and operate former trackage of International Railway Company. The latter company, by contract, operated over trackage of New York Central to reach an industrial area called Lower Town. The agreement between International and New York Central was not assignable and New York Central refused to make a similar arrangement with Erie. Erie then sought authority under § 3(5) for rights over the New York Central line into Lower Town. The Commission granted the relief requested.

In short, contrary to the Commission's holding, there is no requirement that the railroad seeking relief under § 3(5) actually be entitled to serve the terminal facilities sought to be reached. The Commission's holding on this point is contrary to the plain language of the statute and to its own decisions in other cases.

Conclusion

For the foregoing reasons, appellants respectfully submit that the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM INTERSTATE COMMERCE ACT

National Transportation Policy

[49 U. S. C., preceding § 1]

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * *

§ 3(4) Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of

passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * *

§ 3(5) Terminal facilities; use of and compensation for.

If the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be

entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

* * *

§ 5(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify

the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the person specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the

public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

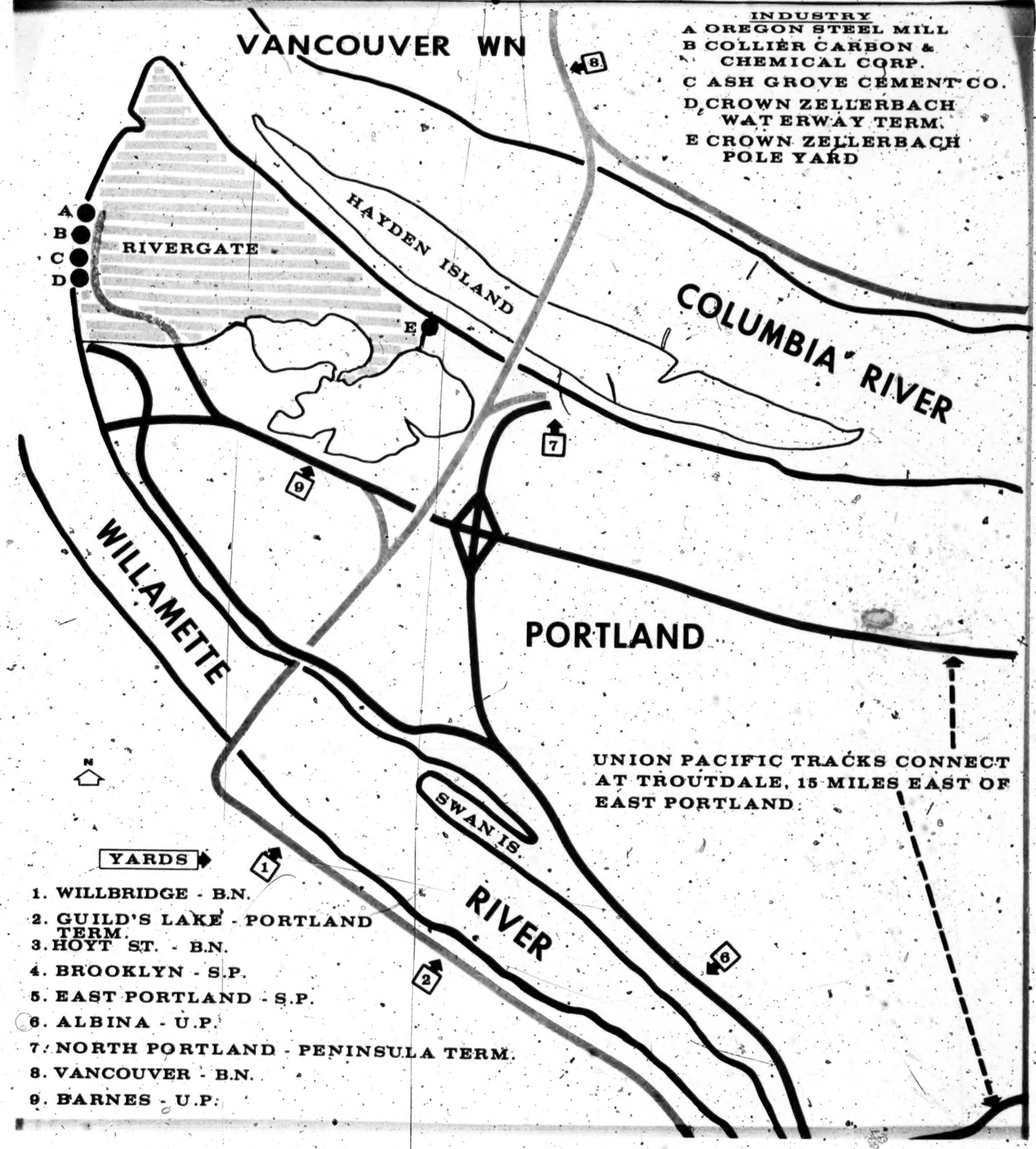
(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

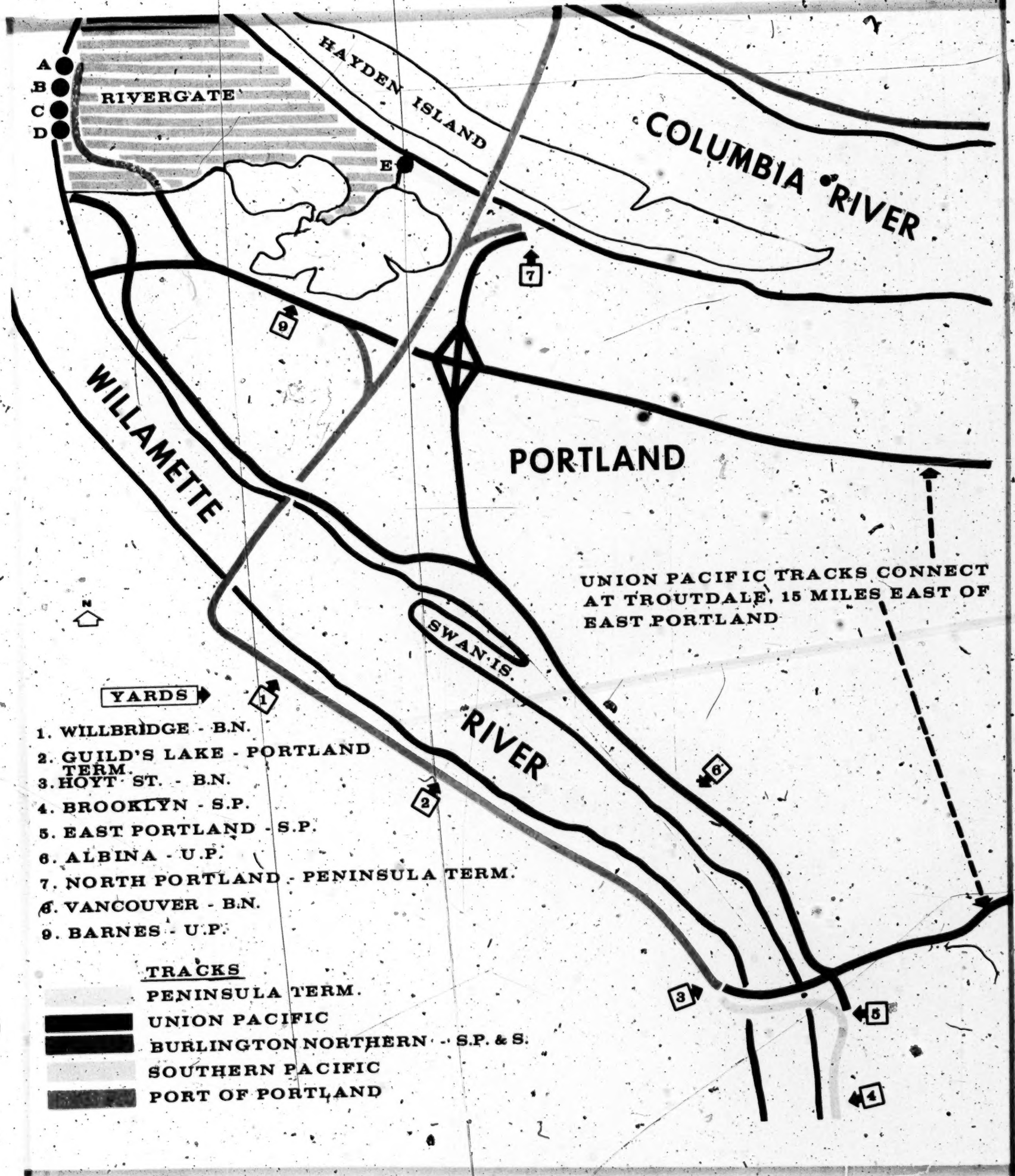
* * *

§ 5(11) Plenary nature of authority under section.

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or

authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.


VANCOUVER WN
INDUSTRY
A OREGON STEEL MILL
B COLLIER CARBON & CHEMICAL CORP.
C ASH GROVE CEMENT CO.
D CROWN ZELLERBACH WATERWAY TERM.
E CROWN ZELLERBACH POLE YARD
A
B
C
D
RIVERGATE
HAYDEN ISLAND
E
COLUMBIA RIVER
WILLAMETTE
PORTLAND
N
SWAN IS.
RIVER
UNION PACIFIC TRACKS CONNECT AT TROUTDALE, 15 MILES EAST OF EAST PORTLAND.
YARDS
1. WILLBRIDGE - B.N.
2. GUILD'S LAKE - PORTLAND TERM.
3. HOYT ST. - B.N.
4. BROOKLYN - S.P.
5. EAST PORTLAND - S.P.
6. ALBINA - U.P.
7. NORTH PORTLAND - PENINSULA TERM.
8. VANCOUVER - B.N.
9. BARNES - U.P.


A
B
C
D
RIVERGATE
HAYDEN ISLAND
E
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7
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UNION PACIFIC TRACKS CONNECT AT TROUTDALE, 15 MILES EAST OF EAST PORTLAND
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4. BROOKLYN - S.P.
5. EAST PORTLAND - S.P.
6. ALBINA - U.P.
7. NORTH PORTLAND - PENINSULA TERM.
8. VANCOUVER - B.N.
9. BARNES - U.P.
TRACKS
PENINSULA TERM.
UNION PACIFIC
BURLINGTON NORTHERN - S.P. & S.
SOUTHERN PACIFIC
PORT OF PORTLAND

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E. ROBERT SEAVER, CL

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~902~~ 70-31

PORT OF PORTLAND, *et al.*,
Appellants,
v.
UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

SUPPLEMENTAL BRIEF OF APPELLANT CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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IN THE

Supreme Court of the United States

October Term, 1970

No. 903

PORT OF PORTLAND, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

SUPPLEMENTAL BRIEF OF APPELLANT CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

PRELIMINARY STATEMENT

This appellant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), is a party to the main brief filed on behalf of all appellants herein. This separate brief will not repeat matters contained in the main brief, but is filed to more fully explain to the court the ramifications of the Commission's decision denying the Milwaukee's petition for inclusion contingent upon Mil-

waukee's entry to Portland which should have prompted the lower court to enjoin and set aside the Commission's Report and Order of June 6, 1969 and remand the proceedings to the Commission for further consideration.

The additional facts and argument will be limited to the scope of questions presented and the statutes relied upon in the main brief.

STATEMENT

This statement will summarize facts and evidence considered pertinent to an understanding of the Milwaukee's position before the Commission and the court below. Any such understanding requires at the outset a brief review of the history and background of Milwaukee's entry to Portland as a consequence of the Northern Lines merger. All of the railroads involved in the application and petitions for inclusion relating to control of Peninsula Terminal Company (Peninsula) and all of the intervenors were either represented at or parties to the Northern Lines merger proceedings before the Commission. The Commission and all of the parties had knowledge of those proceedings and they were incorporated by reference in Milwaukee's pleadings (App. 181). As will be pointed out later, the purpose of the instant application of SP&S-Union Pacific and its timing has a direct relationship to the anticipated entry of Milwaukee to Portland as a trunk line. The Northern Lines merger proceedings were reviewed by the court and the Commission's decision approving the same was affirmed in *Northern Lines Merger Cases (United States v. I.C.C.)*, 396 U.S. 491, 24 L.Ed.2d 700, 90 S. Ct. 708 (1970).

1. The Northern Lines Merger.

Proceedings on the application under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) for approval of the proposed merger of the Northern Lines[1] into a new company originally called Great Northern Pacific & Burlington Lines, Inc. and now called simply Burlington Northern Inc. (BN), and the operation of the Spokane, Portland & Seattle Railroad Company (SP&S) properties by BN under lease, commenced before the Commission in 1961. At that time Rivergate was in the planning stages. The lengthy proceedings which followed are referred to generally as the Northern Lines Merger Cases. The Milwaukee from the outset opposed the proposed merger unless the proposal was modified to subject the new company to certain conditions which it proposed. One of these conditions would require the new company to grant to the Milwaukee entry to Portland and equal joint use of the new company's line of railroad between Longview Junction, Washington and Portland, Oregon, including terminal facilities at Portland, with right to serve industries and to connect with other railroads at Portland and intermediate points between Longview Junction and Portland.

The Northern Lines and Union Pacific vigorously opposed the Milwaukee conditions, Union Pacific being particularly opposed to Milwaukee's Portland entry.

After extensive hearings and briefs, an examiner's report was issued August 24, 1964. The examiner recommended approval of the merger transaction subject to a number of

1. Great Northern Railway Company (GN), Northern Pacific Railway Company (NP), Chicago, Burlington & Quincy Railroad Company (Burlington) and Pacific Coast Railroad Company.

conditions suggested by various parties, some of which had been previously agreed to by the Northern Lines. One of the conditions the examiner recommended was Milwaukee's entry to Portland, an important West Coast seaport and railroad terminal. The examiner's report extensively reviewed the evidence bearing upon this and other conditions proposed by the Milwaukee, as well as the Milwaukee's present and future status as a competitor of the proposed Burlington Northern. The report also considered and made findings with respect to the effect of such conditions upon the proposed Burlington Northern and other railroads, including Union Pacific.

By its Report and Order, decided March 31, 1966 (First Report), a narrowly divided Commission denied the Northern Lines merger proposal, but that report made clear that were the proposal to be approved, most, if not all, of the conditions proposed by the Milwaukee would be required. That decision of the Commission extensively reviewed the artificial and geographical handicaps under which the Milwaukee competed with the Northern Lines throughout the northern tier of states and on the Pacific Coast. It reviewed how the proposed merger would compound these handicaps, all as detailed in the examiner's report.

The First Report found that the Milwaukee provided an essential and efficient rail transportation service in the area where it is the principal competitor of the Northern Lines. It found that Milwaukee's western lines handled an inadequate volume of traffic to sustain this service because (1) its lines did not reach Portland, Oregon, or

Bieber, California as did the Northern Lines, and (2) because the Northern Lines and Union Pacific do not participate in through routes and joint rates with each other or with the Milwaukee at junctions which provide them less than a maximum long haul. Consequently, the Milwaukee could not (without conditions) participate in alternate transcontinental through routes via junctions west of Twin Cities and Missouri River gateways to and from all major west coast terminals, as do all of the other transcontinental railroads terminating on the Pacific Coast. It also found that on north-south traffic, the Milwaukee could not participate in any traffic movements between major west coast cities. It found Milwaukee's participation in substantial movements of transcontinental traffic over its lines west of Twin Cities was limited to that which moved to or from points directly served by its own lines, and that Milwaukee's participation in traffic moving within Mountain-Pacific territory was limited to traffic originating or terminating at local points not served by the Northern Lines. *Great Northern Pac. & B. Lines, Inc., Merger—Great Northern*, 328 ICC 460, 488-500.

On July 27, 1966, the Northern Lines petitioned the Commission for reconsideration of their merger proposal and therein offered to accept all of the conditions sought by the Milwaukee. Before making reply to this petition for reconsideration, the Milwaukee entered into an agreement with the Northern Lines, dated October 24, 1966, spelling out in general terms the conditions offered by the Northern Lines. This agreement was made a part of the record in the proceedings on reconsideration before the Commission in the *Northern Lines Merger Cases* as a form

of stipulation. The agreement[2] was also made a part of the record in the instant proceeding (App. 332-337).

In January of 1967, the Commission reopened the Northern Lines merger proceedings for further hearing and reconsideration. Additional evidence was taken at the further hearings relating to the merger savings in light of the Northern Lines petition for reconsideration and the modifications made to their original proposal. Briefs on reconsideration were filed by several parties and the matter was orally argued to the Commission in June of 1967. The

2. This agreement, so far as it relates to Milwaukee's Portland entry, provides in part as follows:

"1. To the extent that the New Company or SP&S can do so, it will grant to Milwaukee trackage rights over present Northern Pacific and SP&S tracks between Longview Junction, Washington, and Portland, Oregon, including all main, second main, passing and industry tracks . . . with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points regardless of origin or destination of said traffic.

• • •

"3. Milwaukee shall have the right to deliver cars to New Company or SP&S, in interchange or for switching at the SP&S yard in Vancouver, Washington and its Hoyt Street freight yard in Portland.

• • •

"5. Milwaukee shall have use of the said SP&S yard in Vancouver and of Hoyt Street freight yard to receive cars in interchange from the New Company, SP&S and any other carrier reaching such yard.

• • •

"11. To the extent that New Company or SP&S can do so, it will at the request of Milwaukee and in a fair and impartial manner perform at joint facility costs the switching of Milwaukee cars at Kalama, Vancouver and Portland to or from industries and connecting carriers to the extent such service is performed by New Company or SP&S for itself or any other carrier.

• • •

"13. Milwaukee shall pay rental for the trackage rights herein granted, including use of Hoyt Street freight yard as a terminal freight yard, its proportion on a user basis of 5% interest of the valuation based on the original cost plus additions and betterments less retirements of said trackage over which Milwaukee performs line haul or switching operations and of succh other freight facilities as are used by Milwaukee, plus a use proportion on wheelage basis of maintenance and operation and taxes of said trackage and facilities."

Milwaukee, on reconsideration, supported the merger, subject to the conditions offered by the Northern Lines.

Thereafter, there was issued the Report and Order of the Commission on Reconsideration and Further Hearing, decided November 30, 1967 (Second Report). That Report approved the Northern Lines merger subject to a number of conditions set forth in Appendix L thereof. *Great Northern Pac. & B. Lines, Inc., Merger—Great Northern,* 331 ICC 228, 352-360. Conditions 23, 24 and 25 (App. 326-328) state the conditions sought by the Milwaukee and agreed to by the Northern Lines.[3] These three conditions were further conditioned by Conditions 9, 13, 17, 19, 20 and 31 of Appendix L. Conditions 20 and 23 were modified by the Second Report on Reconsideration, decided April 11, 1968 (Third Report). *Great Northern Pac. & B. Lines, Inc., Merger—Great Northern,* 331 ICC 869, 879-886, 887.

The Union Pacific, while not opposing the Northern Lines merger, actively opposed certain Milwaukee conditions and in particular Conditions 24(a) at all stages of

3. Condition 24(a) relating to Milwaukee's Portland access reads in part as follows:

"24. At the request of Milwaukee, presented in writing not more than six months after date of consummation of the unification authorized herein or not more than six months after the effective date of any certificate or order of this Commission:

"(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights of the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by the Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for switching of traffic to other railroads and industries. . . ."

the proceedings before the Commission, as noted in the Commission's Second and Third Reports (331 ICC. 228, 282-283; 331 ICC 869, 872-873). The Union Pacific did not participate in the court review of the Commission's First and Second Reports, as noted in the opinion of the District Court upholding the Commission's approval of the Northern Lines merger. *United States v. United States*, 269 F. Supp. 853, 860 (1969). This court's opinion in the *Northern Lines Merger Cases, supra,* was announced February 2, 1970.[4]

2. Peninsula Terminal

As mentioned in the main brief, Peninsula is an independent terminal railroad whose tracks connect with the Burlington Northern-SP&S main line double tracks extending between Longview Junction and Portland over which the Milwaukee proposed to operate its own trains, engines, cars under its own tariff schedules and billing pursuant to said Condition 24(a). Peninsula's exclusive tracks are physically connected to the BN main lines by a jointly operated, four-track interchange yard at North Portland. North Portland is within the corporate limits and is considered as being within the switching limits of Portland. The interchange yard is known as the North Portland

4. On March 2, 1970, the Northern Lines merger was consummated and Burlington Northern Inc. commenced operation of the combined system. Thereafter, BN and Milwaukee made definitive joint track agreements implementing the trackage rights required by Condition 24, the joint operation and use thereof and for various terminal switching and other services to be performed by BN at Milwaukee's request as stipulated in the above-mentioned agreement of October 24, 1966. These definitive agreements and the operations to be conducted thereunder were submitted to the Commission for approval under Section 5(2) of the Act (49 USC 5(2)) without further public hearing. Approval of the agreement covering Milwaukee's Portland entry was delayed because of protest and subsequent Federal District Court proceedings brought by Union Pacific. However, the Milwaukee commenced operation to and from Portland on March 22, 1971.

interchange. Two of these interchange tracks are owned 50% by Peninsula, 25% by Union Pacific and 25% by SP&S and BN (formerly NP). The other two interchange tracks are owned 50% by Union Pacific and 50% by SP&S and BN (App. 262, 265-267, 368-373).

By agreement of August 31, 1938, as supplemented in 1952 and 1955, one track is used by Peninsula for receiving cars from Union Pacific and SP&S and also from NP and GN; one track is used by Union Pacific for receiving cars from Peninsula and from SP&S, GN and NP; and one track is used by SP&S, GN and NP for receiving cars from Peninsula and Union Pacific; the fourth track is open and is used as a run-around track (App. 265-262).

The three receiving tracks each hold from 30 to 35 cars, or a total of 100 cars at the same time. The tracks are switched twice daily by SP&S, Peninsula and Union Pacific. At the time of hearing, an average of 30 cars per day were interchanged on all of these tracks between all companies, of which from 10 to 20 cars per day were interchanged daily between the trunk lines and Peninsula. The rest of the cars were interchanged between SP&S, GN and NP on the one hand, and Union Pacific on the other. At the time of hearing, by agreement between SP&S and its parent lines under a "car puller" arrangement, SP&S handled cars for the account of GN and NP along with its own from either Vancouver, Washington or the Hoyt Street and Guilds Lake Yards to and from the North Portland interchange track. It will be noted that GN, which had no ownership interest in these interchange yards, interchanged cars at North Portland on the same basis as the owning lines, usually under the above-mentioned car puller arrangement (App. 41, 77, 265-67, 369, 372-73). This

operating arrangement would be taken over by BN but otherwise the physical operation would not be changed by the Northern Lines merger.

Peninsula publishes no tariff of charges for switching cars between the industries it serves at North Portland and the North Portland interchange tracks in connection with line haul movements beyond. Instead, the SP&S, GN, NP and UP publish their line haul rates to and from Portland so as to apply to the industries served by Peninsula. Peninsula is compensated for its switching service by a flat division of the line haul rates set forth in an unpublished division sheet (App. 43, 254-255, 266-267, 284-285). Under this division arrangement, the industries served by Peninsula, insofar as tariff rates and charges are concerned, are treated as if they were local on-line industries of the Union Pacific, SP&S and the latter's parent lines, now BN (App. 468-469). These tariff rate, route and division arrangements would not be changed merely by merger of the Northern Lines.

The Milwaukee and Southern Pacific (SP) provided service to and from Peninsula at the time of hearing under joint routes and rates with Union Pacific or SP&S or either of its parent lines as intermediate carriers over various junctions. SP's nearest junction is East Portland. Prior to Milwaukee's Portland entry, its junctions for Peninsula traffic were outside of Portland, generally Twin Cities, Omaha and other Missouri River gateways, Marengo, Tacoma or Chehalis, Washington (App. 285, 287, 462-468, 534-535).

Peninsula, as an independent company, is neutral in its traffic and operating relations with the trunk lines serving Portland. After it comes under control of SP&S and Union

Pacific, Peninsula policies will be determined by the owning lines (App. 358, 359).

United Stock Yards Corporation (United), the sole stockholder of Peninsula, had Peninsula appraised in 1962 and contacted SP&S in 1963 about selling Peninsula. SP&S did nothing about it at that time, but in 1966 SP&S took a renewed interest in Peninsula, and when Union Pacific learned about it, Union Pacific promptly requested that it be included. A contract with United for the sale of Peninsula's stock jointly to SP&S and Union Pacific was signed February 28, 1967 (App. 255-256, 264-265).

Peninsula's main track extends east and west under the BN north-south double track main line to Portland a distance of about 8,000 feet (App. 250). At the west end is the Port of Portland's Rivergate property (App. 143-144). At the east end is the old Swift & Co. packing plant (App. 273). Crown-Zellerbach, an intervenor in support of appellants in these proceedings before the Commission, has a pole yard at the west end of Peninsula within the boundaries of Rivergate. It has a flexible packaging plant on Peninsula near the said interchange tracks and recently acquired the Swift property for a 200,000 square foot warehouse and ink manufacturing plant (App. 300-301). In all, Peninsula currently serves about 14 industries at North Portland and Rivergate (App. 278).

3. SP&S Union Pacific Plans for Peninsula

As mentioned, the joint application of SP&S and Union Pacific for approval of their acquisition of stock control of Peninsula was agreed to in writing February 28, 1967, but was not filed until July 25, 1967. The joint application

states that such control is in the public interest for the following reasons:

> ". . . the Port of Portland Rivergate Industrial area in North Portland lies one-half mile west of these applicants' physical connection with Peninsula and is reached by the western terminus of the tracks of Peninsula; *that the proposed acquisition will enable applicants to provide rail service to Rivergate over the lines of Peninsula.*" (Emphasis supplied)

It was further stated that the joint applicants intended to continue the operation of Peninsula as a separate carrier and that while no future changes in traffic or revenues were anticipated immediately,

> ". . . *it was anticipated that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of said River Gate Industrial Area by the Port of Portland Commission.*" (Emphasis supplied)

It was stated that it was applicants' opinion that their operation of Peninsula would be of mutual benefit to the three carriers (App. 143-144).

At the hearing before the examiner, applicants' witness in support of the joint application stated:

> "Reference is made in our application *to extending the service of Peninsula Terminal Company into the Port of Portland's Rivergate industrial area.* However, the questions of whether, when and how far such operations will extend into that area are problematical at this time.
>
> "We realize the existing Peninsula trackage has impaired deficiencies due to excessively heavy curvature, impaired clearances and low standard track structure. In my opinion, sooner or later, with industrial growth in Rivergate, extensive expenditures for alter/n/ation of Peninsula trackage will be necessary in order to adequately serve the area. *In fact, it may prove more*

feasible, even necessary, to serve it by new track access direct from the SP&S main line. In such event, Union Pacific and SP&S have already given the Port written assurance that we would provide joint service similar to that provided now via another connection into the Southwest part of Rivergate." (App. 269) (Emphasis supplied)

On cross-examination, the witness had this to say:

"Q. . . . Am I correct that it is your intention, and by 'your' I mean SP&S and UP, to conduct the operation of Peninsula Terminal with the status quo of the trackage and equipment that presently exists?

"A. That is what we contemplate, yes.

"Q. The development of the Rivergate area will have a decided effect upon that decision, will it not?

"A. It could very likely, yes.

"Q. Haven't you in your plans made some provision for the potential growth of Rivergate area and the use of the Peninsula Terminal as a carrier?

"A. Not exactly, no. The plans for the development of the Rivergate area are long range, and I don't believe that there is any hard, fast plans that have been made. We are flexible.

"Q. But you certainly realize that changes will definitely have to be made in the Peninsula trackage when the Rivergate area opens up, don't you, sir."

° ° °

"A. Yes." (App. 6, Vol. V, Tr. 91-92)

° ° °

"Q. Mr. Westergard, you referred to your plan to have the Peninsula Terminal properties operated by Peninsula Terminal as a short range plan. Can you tell us what your long range plan for operation of the property is?

"A. I wouldn't say we have a long range plan. It is flexible just like all our operation and developments

are, and I think because I stated or said in my statement it's conceivable that it may be used to serve a portion of the Port of Portland Rivergate development, as a matter of fact, it does not now actually serve port property, but the day will come eventually with the development of the port as they hope and anticipate, that Peninsula in its present condition couldn't adequately serve a sizeable development.

"Q. Do you have a tentative plan as to who will be the operator of the properties at that time?

"A. I visualize the Peninsula continuing as is. But the way the trunk line railroads serve Rivergate with a direct access with their own power at least on the basis something like we are doing down at the west end now." (App. 6, Vol. V, Tr. 142-143)

° ° °

"Q. Mr. Westergard, I understand the application asks for the right to buy into Terminal Company and the use of those trackages. I believe that has been established. Does SP&S and UP now have any track rights on terminal itself?

"A. No, sir. We would have to have permission and we would have to apply to the Interstate Commerce Commission for such trackage rights and, in fact, if and when we acquire it we would have to apply to the Commission for such rights, which we are not doing." (App. 386)

SP&S and Union Pacific serve Rivergate from the southwest side by a jointly owned track from Union Pacific's Barnes Yard to the southern boundary of Rivergate. The operation is provided for in a contract dated May 26, 1967. The operation commenced in 1964 but discussion with the Port to provide this connection began in 1958 or 1959. For carrier convenience, the Union Pacific crews and engines switch the cars of both SP&S and Union Pacific to the industries at Rivergate reached by this track to avoid du-

plication of services. GN and NP cars are handled along with SP&S cars under this arrangement. A similar arrangement prevails on the jointly owned track of SP&S and Union Pacific extending from Barnes Yard to Municipal Terminal 4, located south of Rivergate (App. 303-314, 379-380, 380-386).

The SP&S and Union Pacific propose to continue their same rate-making policies as owners of Peninsula, as had previously prevailed (App. 279, 285, 287).

Other railroads would continue to handle traffic to and from Peninsula under a joint rate and through route arrangement. This would mean that Milwaukee would continue to participate in traffic to or from Peninsula via joint rates with either Union Pacific or SP&S or one of the latter's parent lines via existing junctions. The existing junctions on transcontinental traffic so far as Milwaukee is concerned would be Twin Cities or Missouri River gateways and, to a limited extent, via Marengo, Washington in connection with Union Pacific, and on Mountain Pacific traffic and north-south traffic, via Marengo, Tacoma and Chehalis, Washington. UP and SP&S and the latter's parent lines have no existing routes and rates to or from Peninsula in connection with the Milwaukee from or to common points such as Seattle, Tacoma, Spokane, etc. They participate in some routes and rates to or from Milwaukee local non-competitive points via the gateways in the State of Washington (App. 285, 462-468, 534-535).

Union Pacific admitted that its purpose in acquiring ownership of Peninsula jointly with SP&S was to block Milwaukee from obtaining a direct connection with Peninsula at North Portland for interchange of traffic there, and

also from obtaining through Peninsula direct access via North Portland to Rivergate, upon extension of Milwaukee's operations to Portland. By so doing, traffic moving between Milwaukee and Peninsula would require Union Pacific or BN as an intermediate line haul or switching carrier, depending upon the circumstances. These applicants admit this would keep the Milwaukee at a competitive handicap as a trunk line carrier serving Portland so far as North Portland and Rivergate industries are concerned (App. 412, 437-441). They admit that when Milwaukee extends its operations to Portland, Milwaukee would expect to participate in a greater share of traffic to and from Peninsula if its service was equal to the other lines. But without joint ownership of Peninsula and joint use of the North Portland interchange tracks, after Peninsula was acquired by SP&S and UP the Milwaukee would not be on an equal basis with the joint applicants (App. 440). Applicants agree that Milwaukee would be at a solicitation handicap in obtaining traffic to or from Peninsula if SP&S and Union Pacific became Peninsula's sole owners (App. 437).

4. The Milwaukee's Request for Inclusion

The Milwaukee's original petition stated that Milwaukee would soon be a railroad serving Portland and would connect with Peninsula and should be included in the transaction, so that it could serve North Portland and Rivergate on the same basis as that proposed by the BN and UP, as set forth in the joint application, and in order to fully enjoy the same ownership rights in Peninsula as the BN and Union Pacific proposed, it asked that the transaction be conditioned to provide that Milwaukee could have the right to use the intervening North Portland interchange

tracks and physically connect its own operations to Peninsula's exclusive tracks to the same extent as applicants (App. 162-166).

Union Pacific, in its separate answer, asserted that Milwaukee, upon extension of its operations to Portland, would not connect with Peninsula because Milwaukee would be unable to use the North Portland interchange tracks in any manner without the owners' joint consent (App. 177-180). Accordingly, the Milwaukee, assuming this assertion would be proved, by supplement to its petition for inclusion, also requested a Commission order under Section 3(5) of the Act granting use of the North Portland interchange tracks on reasonable terms so as to directly connect its own operations with Peninsula and make interchange there (App. 180-183).

The Milwaukee also petitioned the Commission for a subpoena to require the applicant companies *inter alia* to produce the contract of August 31, 1938 and the supplements thereto, between Peninsula, SP&S, NP, GN and UP, covering the joint use and operation of the North Portland interchange tracks, in order to determine whether there was any legal basis for claiming that Milwaukee would not be a directly connecting trunk line of Peninsula upon its entry to Portland by reason of BN-UP-Peninsula joint ownership of the intervening interchange tracks (App. 184-191). The petition for subpoenas was denied, and the contract was never produced (App. 197, 370-374). The assertion that Milwaukee, upon its entry to Portland, would not be a line directly connecting with Peninsula was never otherwise proved in the case.

The Milwaukee witnesses stated that its officers were authorized to implement the Milwaukee Portland condition

upon consummation of the Northern Lines merger (App. 374, 523). They stated that they proposed to be fully competitive at Portland and to provide rates and service in connection with Peninsula and Rivergate as a Portland trunk line on an equal basis with BN. The Milwaukee proposed to publish joint rates and afford Peninsula divisions, the same as the applicants, thus making Peninsula industries for rate purposes on-line industries of Milwaukee, the same as applicants, without involving switching charges or switching charge absorptions (App. 522, 528, 532-535).

The Milwaukee witnesses stated that under their agreement of 1966 with the Northern Lines, the point of interchange with BN was Hoyt Street, unless similar arrangements could be made to use the Portland Terminal Company's Guilds Lake Yard; that under that agreement BN would at Milwaukee's request switch cars from Hoyt Street Yard at joint facility contract rates to connecting lines' interchange tracks to the same extent as it did for itself, but with respect to Peninsula this would involve a back haul of 8 miles and 24 hours delay in service; that to avoid intermediate handling the Milwaukee preferred to have its road trains pick up and set out cars at North Portland for interchange with Peninsula, but if BN would not permit this because of congestion, it could be arranged to have BN crews transfer them from Vancouver to North Portland as agent for Milwaukee in a puller arrangement in the same manner as SP&S then handled GN and NP cars to and from the North Portland interchange (App. 330-332, 524-526, 529, 571-572).

The Milwaukee witnesses stated that based upon experience, were Peninsula to come under control of BN and Union Pacific, Peninsula would no longer be neutral, but

would be used by SP&S and UP to further their own interests, to the detriment of the Milwaukee and the shippers and receivers served jointly by the Milwaukee and Peninsula (App. 338-343, 522, 526, 530-536).

The applicants suggested that if the Milwaukee's own road trains to and from Portland set out and picked up cars at North Portland, it would be necessary for Milwaukee to construct a fifth interchange track at North Portland (App. 269-270). There is nothing in the record which would suggest this could not be done if necessary.

ARGUMENT

The Commission, in its report here under review, states:

> "With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries there; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that

it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. * * *"

In footnote 10 on the same page, the Commission invited the Milwaukee to reopen the *Northern Lines* case to "determine the relationship of condition No. 24, if any, to Peninsula's tracks." (App. 29).

This approach disregards the fact that Milwaukee's petition for inclusion was generated by the SP&S and UP joint application which would change condition 24(a) substantially unless Milwaukee were included. This wrong approach to Milwaukee's petition led the Commission to say:

> "We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within the undefined geographical area.
>
> "* * *
>
> "Confining our consideration of the terminal area involved to Peninsula, we find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory.
>
> "* * *
>
> "The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership" (App. 30, 33)

These conclusions are entirely unsubstantiated and demonstrate a lack of expert analysis of the various issues in the case.

1. Condition 24 of the *Northern Lines Cases* Affords the Milwaukee a Direct Connection with an Independent Peninsula

Upon extension of Milwaukee's operations to Portland in strict accordance with Condition 24, using only BN trackage, Milwaukee would directly connect with Peninsula and be in position to establish joint routes and rates via the North Portland interchange the same as BN and UP. Condition 24 did not limit the arrangements Milwaukee could work out with other carriers at Portland, including Peninsula, once it could operate its own trains and publish its own rates for application via its lines to and from Portland. The agreement of October 24, 1966, between Milwaukee and the Northern Lines provided that Milwaukee could use all BN trackage between Longview Junction and the SP&S Hoyt Street Yard at Portland which the BN had the power to grant for the operation of Milwaukee engines, trains and cars. Peninsula is directly connected to the BN tracks by the jointly owned and operated North Portland interchange tracks.

Unless there was a legal impediment to Peninsula handling Milwaukee inbound and outbound cars over the North Portland interchange tracks, nothing further was needed. There was no evidence that the jointly-used BN-Milwaukee trackage to Portland would not connect with Peninsula's jointly-owned interchange tracks, or that Milwaukee, upon entry to Portland, could not publish its line haul rates to apply to Peninsula industries pursuant to Condition 24(a), the same as SP&S, GN and NP had been doing for years. There was no reason for Peninsula, a neutral terminal road, not to be agreeable to this. The only legitimate objection made was to the use of the North Portland interchange

tracks to set out and pick up cars by Milwaukee's own road crews and engines. It was contended that this type of operation would require the construction of a fifth track on which Milwaukee crews could pick up cars and that this kind of physical operation might create unnecessary congestion at North Portland Junction.

Only Union Pacific asserted Milwaukee would not be able to directly connect with Peninsula one way or another under Condition 24(a) because of its joint ownership interest in the interchange tracks. But its joint ownership in the North Portland interchange yards does not justify the conclusion that Milwaukee would not be able to directly connect with Peninsula under Condition 24. Only if the contract of 1938, as supplemented, covering the joint use of these tracks for interchange, forbade Peninsula from switching to and from Milwaukee over BN and Peninsula's own assigned tracks in the North Portland interchange yard, would Peninsula be prevented from physically connecting with Milwaukee. Such contract provision would be purely anti-competitive. Regardless, that agreement as supplemented was never produced and there is no testimony on the subject. Hence, the assertion that Milwaukee would not directly connect with Peninsula under Condition 24(a) was never proved. The Milwaukee under Condition 24(a) was free to connect with Peninsula at North Portland upon entry to Portland under Condition 24(a).

2. Milwaukee, Under Condition 24, Could Serve Rivergate and North Portland as a Trunk Line Directly Connecting with an Independent Peninsula

Milwaukee's petition for inclusion was not, in the final analysis, based upon its need to physically operate with its own engines and crews upon the North Portland inter-

change were Peninsula to remain independent, although it sought to use those tracks by its own engines and crews under Section 3(5) and as a condition to the transaction proposed. Its petition was based upon the fact that Peninsula, as a joint owner and user of the interchange tracks, did in fact thereby connect with those exclusively-owned BN tracks upon which Milwaukee was to be granted trackage rights by BN under Condition 24. Consequently, neither BN nor Union Pacific would be in any position to stop the Milwaukee from entering into through rates and routes via North Portland with Peninsula were it to remain independent. Under Condition 24(a) the problem was merely the practical method of physically handling the cars over the interchange tracks, not the existence of a physical track connection between Milwaukee and Peninsula.

In this, Milwaukee is aided by Section 1(4) of the Interstate Commerce Act, which requires every common carrier, such as Peninsula and the Milwaukee, to establish reasonable through routes and rates and to provide reasonable facilities for their operation. (49 U.S.C. §1(4)). Section 3(4) of the Act requires all such carriers, according to their respective powers, to afford all reasonable, proper and equal facilities for interchange of traffic between their respective lines, and not to discriminate in their rates and charges between connecting lines. 49 U.S.C. §3(4); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 149 U.S. 777, 37 L.Ed. 964 (1889). Section 3(5) empowers the Commission to order the use of such terminal tracks as are required for this and other purposes. (49 U.S.C. §3(5)).

The Northern Lines-Milwaukee agreement of 1966 is silent as to points of interchange with other carriers at

Portland, whether for local switching or for through line haul movement. This is not surprising, since the practice is for the receiving line to designate the tracks for delivery of cars for interchange, unless agreed otherwise. BN and Milwaukee could not designate these tracks for the account of other lines. This does not indicate, however, that under Condition 24(a) no Milwaukee interchange would take place with Peninsula at North Portland unless its petition for inclusion were granted. The Commission noted, at page 283 of its Second Report, that other provisions of law would apply to UP-Milwaukee relations as connecting carriers. The same is true for Peninsula.

The physical handling of the cars could be accomplished under various arrangements. One way would be to have BN handle between Hoyt Street and North Portland, as provided for in the October 24, 1966 agreement. Another would be to have Milwaukee's crews and power pick up cars from one of the assigned interchange tracks and make delivery on the assigned Peninsula track. Picking up cars at North Portland interchange tracks by Milwaukee engines and crews could either require the consent of the owning lines or at least the one to whom it is assigned, or require the Milwaukee to construct a fifth track at North Portland on which to receive cars from Peninsula for pickup. A third method would be to have BN handle the cars between Vancouver and North Portland as Milwaukee's agent in a transfer or car puller arrangement. This would eliminate the backhaul between Hoyt Street and North Portland.

How these arrangements would ultimately be worked out has nothing whatever to do with whether the Milwaukee would directly connect with Peninsula at North Portland under Condition 24(a) as prescribed. These are prac-

tical operating problems. The physical connection at North Portland is there for a legal interchange by reason of Peninsula's existing track connections through jointly-owned interchange tracks and Condition 24.

3. The Commission Confused "Trackage" with "Territory" and Changed Condition 24

The confusion into which the Commission was led was caused by a basic misunderstanding of the purpose of the application and Milwaukee's petition for inclusion.

The SP&S and UP stated in their application that they desired to control Peninsula in order for *applicants* to use it as an access to Rivergate. This could be and was interpreted two ways: (1) that Peninsula service in connection with BN and UP would be extended to Rivergate over Port-owned tracks; or, (2) that the owners could have Peninsula grant to the owners running rights over Peninsula tracks to the Port tracks in Rivergate, for operation by the owners upon Port tracks. In either case, the owning trunk lines could operate the Port tracks jointly, one method using Peninsula as their agent, the other, without using Peninsula service, but only tracks, the same as is done in the southwest part of Rivergate where SP&S (BN) has its entry via UP's Barnes Yard tracks. In either case, the switching of Peninsula's existing industries by Peninsula would not be changed. Peninsula, whether independent or carrier owned, could also extend its operations to Rivergate as a separate connecting common carrier.

The Milwaukee sought inclusion as a joint owner in order to have all of these same options preserved to it. It sought, under Sections 5(2)(b) of the Act, use of the North Portland interchange tracks for its own power and

crews so as to be on an equal basis with BN and UP in case the owners decided to operate with the owners' power and crews into Rivergate over Peninsula tracks. Such a choice would not necessarily involve duplication of service where the parties, as the various agreements in this case indicate is normal and usual, agree upon a division of work to avoid duplication of switching. Under Section 3(5) of the Act this use of the interchange by Milwaukee, of course, would also have removed all doubt about whether Milwaukee road crews and engines could set out and pick up at North Portland. The applicants, on the other hand, indicated at the hearing that they thought they needed Commission authority to operate to Rivergate over Peninsula tracks, although there is some doubt about that. The applicants at the hearing indicated, however, that they proposed to have Peninsula services extended to Rivergate for the foreseeable future rather than seek trackage rights over Peninsula or constructing a new track into Rivergate. This could be as the owners' agent or as a separate common carrier.

Apparently, the Commission thought the Milwaukee's petition for inclusion was an attempt in this case to gain direct access to North Portland and Rivergate by operating its own engines over Peninsula's tracks. This is contrary to Milwaukee's various pleadings and testimony. The Commission thought this use of Peninsula trackage would give Milwaukee direct access to territory at North Portland and Rivergate which would not otherwise be available at North Portland via an independent Peninsula under Condition 24. To the contrary, in the event Peninsula came into the hands of SP&S and UP without including the Milwaukee it would foreclose Milwaukee's equal access to Peninsula territory. If the transaction were approved and Milwaukee

were included, the Milwaukee would get nothing more than applicants would attain from ownership of Peninsula. The Commission, in reversing the examiner reversed the entire field, and disregarded the main purpose of the application by SP&S and UP.

4. Applicants Intended to Block Milwaukee's Portland Entry

Applicants admitted that their joint ownership of Pensula was filed in order to block the Milwaukee from establishing routes and rates with Peninsula via North Portland, which was otherwise inherent in Condition 24(a) when implemented. They admitted that once they had control of Peninsula without inclusion of Milwaukee, the Milwaukee would thereafter be at a competitive handicap at Portland because Rivergate was the last remaining industrial area at Portland. The admission that Milwaukee would not be able to participate in as much business at Portland if joint applicants controlled Peninsula as would be the case if it remained independent, in and of itself is an admission by joint applicants that implementation of Condition 24(a) would give Milwaukee direct access to an independent Peninsula, and a means to provide service to North Portland and northeast Rivergate on the same basis as joint applicants.

The peculiar fact that Peninsula does not publish switching charges, but instead the trunk lines' linehaul rates apply to Peninsula industries under a divisional arrangement, has ramifications never considered by the Commission in its Report.

As the Commission pointed out in its First Report in the *Northern Lines Merger Cases*, the Northern Lines and

Union Pacific do not participate in joint rates and routes which afford less than a maximum haul. The joint applicants stated that this policy would be followed in connection with their ownership of Peninsula. This is the policy that resulted in the inadequate volume of traffic via the Milwaukee, holding its participation to traffic to and from its local points only on the north-south and Mountain-Pacific traffic. This is the policy that prevented Milwaukee from participating in traffic between major west coast cities, such as between Spokane, Seattle or Tacoma, Washington, on the one hand, and Portland, Oregon, on the other. This is the rate policy that prevented Milwaukee from being a rate-making line to Portland and discouraged the publication by Milwaukee of joint rates to and through Portland because it was forced to use short haul off-junctions with nothing in the return direction. It is this policy which joint applicants say they will extend to Peninsula and preserve for the future. It is this policy which the Commission perpetuated for the Milwaukee, by approving joint control of Peninsula by BN and UP, without including the Milwaukee, and by prescribing the conditions on page 436 of its Report (App. 35).

The timing of the application and the Commission's decision thereon of June 6, 1969 is such that the existing traffic and operating relationships and existing routes and rates do not include routes and rates then yet to be established between the Milwaukee and Peninsula under Condition 24(a) in the *Northern Lines Merger Cases*. Consequently, Milwaukee's Portland entry can be largely defeated by the Commission's decision in this case.

Moreover, once the SP&S and UP get control of Peninsula, Peninsula will no longer be required to establish

rates which short haul its parent lines, because Peninsula will be under common control and management of the owners. The Commission, in some other proceeding, would be powerless to require Peninsula to open North Portland to Milwaukee as a junction. In *Chicago, Milwaukee, St. Paul & P. R. Co. v. United States,* 366 U.S. 745, 6 L.Ed.2d 772, 81 S. Ct. 1630 (1961), commonly called the *Spokane Gateway Case,* this court held that the Commission was without power under Section 15(3) of the Act to require a carrier under common control of two other railroads (as was the SP&S under control of GN and NP) to participate in joint through rates with another (the Milwaukee) which short hauled the parent lines, without a showing of necessity as required by Section 15(4).

5. The Application Was Filed with the Intent to Reduce the Territorial Scope of Milwaukee's Portland Entry Before It Became Effective

The applicants did not wait until long after the *Northern Lines Merger Cases* were closed before filing their application. They recognized that when the Northern Lines offered all of Milwaukee's conditions, they had to move in on Peninsula before the merger was consummated and Condition 24(a) implemented if they were to block Milwaukee from North Portland and Rivergate served by Peninsula. They finalized their arrangements with United only three months after the Northern Lines-Milwaukee agreement was reached with respect to the Milwaukee conditions. They waited until after oral argument on reconsideration to file their application and make public their plans. Their intent was to reduce the Portland territory available to Milwaukee under Condition 24. Commission denial of the application would have retained the

status quo pending implementation under Condition 24. Inclusion of the Milwaukee would have assured to the Milwaukee with BN at North Portland and Rivergate for the future. Equality

6. Milwaukee's Petition for Inclusion Did Not Involve Joint Union Pacific-SP&S Territory

The Commission considered Milwaukee's petition as an invasion of territory. The fact is that Condition 24(a) provided the basis for the invasion of Peninsula territory. Entry into Portland as a trunk line carried with it the right to maintain Portland as a junction and point of interchange with all other carriers there, including terminal railroads and other trunk lines, whether they published joint line haul rates with connecting roads via Portland or intermediate points between Longview Junction and Portland, or published connecting line switching charges for switching to their industries. It also carried with it the right to negotiate the necessary physical arrangements to carry this out and to apply to the Commission or the courts under other sections of the Act when the public interest required or violations of law were practiced. Peninsula was not owned or operated by SP&S or UP and upon Milwaukee's entering Portland Peninsula would have had the same relationship to the Milwaukee as with BN and UP.

The joint application was the moving cause for Milwaukee's petition for inclusion. The SP&S-UP proposal would have severely limited the expected public benefits from Milwaukee's Portland entry. Milwaukee's inclusion would have preserved these benefits. The Commission turned this around as if the Milwaukee either sought to obtain something it would not otherwise have had or sought some-

thing which joint applicants did not seek for themselves by their application.

7. The Commission Shifted the Burden of Applicants to Milwaukee and to the *Northern Lines Merger Cases* by Treating Milwaukee's Defensive Petition for Inclusion as a New Application

In view of the direct relationship between the intent of the joint application and the Commission's expressed intent in Condition 24 previously agreed upon, and the logical results flowing therefrom, the Commission, instead of denying Milwaukee's inclusion, should have denied the joint application or included the Milwaukee. Instead, the Commission, by footnote to its Report, shifted the burden of showing the relationship between Condition 24(a) and Peninsula trackage ~~him~~ the Milwaukee in a proposed reopening of the *Northern Lines Merger Cases*.

This is not a mere change in procedure. The decision results in a change in Condition 24(a) as sought by joint applicants in this collateral proceeding, and then requires the Milwaukee to challenge the decision in the *Northern Lines Case*. It is SP&S and Union Pacific who should be required to seek modification of Condition 24(a) in the *Northern Lines Case* if it was thought this Milwaukee condition should be restricted or conditioned with respect to North Portland or Rivergate territory served or to be served by Peninsula. There are several conditions set forth in Appendix L to the Commission's Second and Third Reports in the *Northern Lines Merger Cases* which apply to and restrict the implementation of Condition 24. That is the proceeding where joint applicants should have tried to exclude Milwaukee from Peninsula territory.

The Milwaukee sought no interpretation of Condition 24 in the instant case. Milwaukee opposed the application unless included as a joint owner. The Commission could have dismissed the joint application without prejudice or held it in abeyance until the applicants modified or clarified Condition 24(a) in the *Northern Lines Case*.

Instead, the Commission collaterally modified Condition 24. Despite the Commission's statement that it took nothing from Milwaukee, it gave joint applicants a tool by which to control Milwaukee's Portland entry.

8. The Commission Used the Wrong Legal Criteria in Failing to Consider the Effect of Its Decision Upon Condition 24 Prescribed in the Northern Lines Merger

Section 5(2)(c) of the Act requires the Commission to give weight to the effect of the proposed transaction upon adequate transportation to the public. The Commission ignored the future interests of shippers and receivers of freight at numerous stations on Milwaukee, as well as those on the tracks of Peninsula at North Portland and as served by Peninsula in Rivergate. The Commission had no evidence that Milwaukee's mere inclusion in the instant transaction would result in a loss of traffic by joint applicants which would not be the case upon Milwaukee's entry to Portland, were Peninsula independent. To the contrary, the evidence is that Milwaukee would lose potential traffic expected under Condition 24 by approval of the transaction unless included.

The Commission is required to weigh not only the effect of inclusion upon the public interest, but also the effect of failure to include other carriers. The Commission focused only upon the *status quo* as of the time the application was

filed. It stuck its head in the sand, ignoring the effect of its decision upon the proposed service by Milwaukee in the foreseeable future already forecast in the *Northern Lines Merger Case.* In fact, the ends to be achieved by the Northern Lines merger, which by reference were also made the law of the case by Milwaukee's pleadings in this collateral proceeding, should have governed the result in this case.

SUMMARY

The Commission, instead of viewing the application of SP&S and Union Pacific as an effort to obtain control of Peninsula independently of the *Northern Lines Merger Cases* and Condition 24(a), should have considered how the application would affect its prior findings and order which broadly fixed the relationship of the parties for the future. It should not have approved this collateral modification of Condition 24 until it is determined how its approval would affect the earlier decision and Milwaukee's relationship to Peninsula and its tracks under Condition 24. This it did not do. In short, the Commission considered how the petition for inclusion would affect the applicants and their shippers and made a presumption they would lose something, but never made any findings as to how the transaction approved would affect the Milwaukee and its shippers and its ability to provide service to the public, upon extension of its operations to Portland.

The decision disregarded the benefits of rail competition throughout the northern tier of states and the western states and the need for service to and from Rivergate and North Portland on a competitive basis from the entire area. Instead, it concentrated on the trackage and territory of Peninsula in relation to SP&S and UP. The Commission was wrong in concluding that Milwaukee, by its petition for inclusion, merely sought to expand Condition 24(a) and thereby invade new territory—territory that was not ever served directly by UP or BN, but by an independent Peninsula. Milwaukee never sought to switch cars to Peninsula industries with its own engines and crews. It only sought to preserve to itself and the public the rights and service promised by implementation of Condition 24(a).

were Peninsula to remain independent, and such additional rights and benefits as the joint owners might in the future enjoy by reason of the proposed transaction.

This basic error cannot be corrected in another proceeding. The Commission has no jurisdiction over Union Pacific, one of the joint applicants, or over Peninsula, in the *Northern Lines Merger Cases* because they were neither applicants nor parties seeking conditions in that case. Once consummated, the present transaction cannot be corrected by the Commission to establish Peninsula as a railroad connecting with the Milwaukee at North Portland without the owners' consent.

Respectfully submitted,

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No. ~~000~~ 70-31

In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

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Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 903

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. The report and order of the Interstate Commerce Commission dated June 6, 1969 (A. 11–67), appear at 334 I.C.C. 419. The order of the Commission denying reconsideration and other relief (A. 579), the subsequent order of the Commission finding no issue of general transportation importance (A. 581), and the recommended report and order of the hearing examiner (A. 69–135), are not reported.

JURISDICTION

The final judgment of the three-judge district court affirming the Commission report and orders in issue was entered July 9, 1970 (A. 9). The notice of appeal

was filed September 1, 1970 (A. 585), and probable jurisdiction was noted February 22, 1971 (A. 589). The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162; *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56.

QUESTIONS PRESENTED

The Interstate Commerce Commission has granted the application of two of the line-haul rail carriers serving Portland, Oregon (Burlington Northern and Union Pacific) to acquire an independent terminal railroad facility serving an industrial and port complex there; it has denied the applications of the two other line-haul carriers serving Portland (Milwaukee and Southern Pacific) for inclusion as equal owners of the facility. The questions presented are:

1. Whether the Commission's failure to examine the foreseeable transportation needs of the industrial and port complex and the public interest in multi-line competitive direct rail service there in evaluating the inclusion applications is consistent with the Commission's obligation to weigh competitive and other public interest factors in passing upon rail mergers and acquisitions.

2. Whether the Milwaukee was entitled to participate in control of the terminal railroad facility under the mandate of *Northern Lines Merger Cases*, 396 U.S. 491, where the Commission had imposed a condition requiring Burlington Northern to give Milwaukee direct and meaningful access to all Portland traffic.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, and Sections 3(5) and 5(2) of the Interstate Commerce Act, 49 U.S.C. 3(5), 5(2), are reproduced in the Appendix to this brief, pp. 35–38, *infra*.

STATEMENT

This case involves an order of the Interstate Commerce Commission, issued under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)), authorizing the joint acquisition of a heretofore independent switching railroad at Portland, Oregon, by two of the four line-haul railroads serving that city. The switching railroad, Peninsula Terminal Company, is of current interest to the carriers because it provides access to the Rivergate Industrial District, a modern industrial and port complex being developed and operated by the appellant, Port of Portland. The two railroads authorized to acquire Peninsula are the Union Pacific Railway Company and the Great Northern Pacific & Burlington Lines, Inc. ("Burlington Northern"), through its subsidiary the Spokane, Portland & Seattle Railway Company ("SP&S").[1] This case arises out of the Commission's denial—in dis-

[1] The SP&S is a subsidiary of the new company formed by the merger of the Great Northern Railway Company and the Northern Pacific Railway Company, approved by this Court last Term under the caption *Northern Lines Merger Cases*, 396 U.S. 491. As an aspect of that merger, the SP&S was permitted to lease its properties to Burlington Northern, so that it operates as an integral part of that railroad. Prior to the merger, the SP&S was jointly owned by the Northern Lines. Reference to Burlington Northern in this brief includes its SP&S operations.

agreement with its hearing examiner's recommendation—of the petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Southern Pacific Transportation Company (which are the two other line-haul carriers serving Portland) seeking inclusion as joint owners of Peninsula under Section 5(2) (b), (c) and (d), 49 U.S.C. 5(2) (b), (c) and (d). The Milwaukee and Southern Pacific appeal from the district court's affirmance without opinion, together with the Port of Portland and the Public Utility Commissioner of Oregon. The United States joins the appellants in urging that the judgment below be reversed.

A. THE RIVERGATE COMPLEX AND PENINSULA'S IMPORTANCE TO IT

The developing Rivergate Industrial District occupies the 2,942 acre tip of a peninsula formed by the confluence of the Columbia and Willamette Rivers. Rivergate's six miles of waterfront will provide dock-sites for direct deepwater access to the Pacific Ocean. The Port of Portland has expended more than five million dollars of public funds there for planning, construction and development, and it is estimated without challenge that ultimate public and private investment in industrial and port facilities at Rivergate will exceed 500 million dollars (A. 57–59, 228–229).

As conceived by its public developers, the Rivergate complex will be served by a domestic transportation network capable of providing efficient and economical service to and from points throughout the nation. To achieve this the Port's consultants, in an 18-month

study, recommended construction of an internal rail system by the Port to provide Rivergate industries unrestricted direct access to all Portland line-haul carriers (A. 5). At full development, rail traffic generated by these industries is expected to reach between 500 and 600 cars per day, with a projected annual volume of five million tons of freight (A. 57-59).

Peninsula's relationship to the Rivergate complex is shown by the simplified map set forth as an appendix to the joint brief for the appellants.[2] As that map shows, Peninsula's 3.79 miles of track are one of the two existing means of access to Rivergate by rail, providing the northern point of entry to the property. This track extends along the Columbia River shore under the Burlington Northern main line, to which it is connected at its southeast end by interchange tracks owned in part by Peninsula and in part by Burlington Northern and Union Pacific.[3] The other terminal connecting to Rivergate is Barnes Yard to the south, a facility already owned by Union Pacific. It is located between the two rivers and connects at Rivergate's boundary with the Port of Portland's tracks coming from industries located at Rivergate's Willamette River shore. By existing agreement (A. 303), only Union Pacific and Burlington North-

[2] A more detailed map appears opposite A. 354. Unless otherwise indicated, all "Map" references in this brief will be to the simplified map.

[3] Peninsula already serves the 40-acre pole yard of the Crown Zellerbach Corporation, located at the eastern end of Rivergate, over industrial tracks owned by that corporation (See map).

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ern's subsidiary SP&S will have direct assess to Barnes Yard.

Accordingly, the effect of exclusive control of Peninsula by Burlington Northern and Union Pacific will be to assure that only those two carriers would have direct access to existing facilities reaching Rivergate. The other two line-haul carriers now serving Portland, Milwaukee and Southern Pacific, will have to switch and interchange their Rivergate traffic with these carriers. This process can take as long as 30 hours after the cars of the Milwaukee and Southern Pacific reach the Portland area (A. 97–100). These switching problems are described further at pp. 15–16, *infra*.

Peninsula, the last independent terminal company in Portland, was organized in 1918 to provide switching facilities for the stockyards and other industries located at North Portland Station. Over the years, the traffic generated by these companies has changed materially, and rail traffic dependent upon stockyard operations, traditionally the leading industry, is declining. Peninsula's present owner, United Stockyards Corporation, is not a carrier and has no interest in operating a railroad independent of its stockyard operations. It therefore has been willing to sell its stock in Peninsula at its appraised value, and has no preference as to the purchaser (A. 39–41). On February 28, 1967, United entered into an agreement to sell the stock of Peninsula to Union Pacific and SP&S (A. 146).

B. THE APPLICATION AND THE PETITIONS FOR INCLUSION

SP&S and Union Pacific filed their joint application for Commission approval of the acquisition on July 25, 1967 (A. 137). The application pointed out the importance of Peninsula's tracks to the developing Rivergate complex and the applicants' plan to use the tracks to serve the new complex (A. 143-144). While no immediate changes in Peninsula traffic and revenues were said to be anticipated, the applicants asserted "that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of the said River Gate Industrial Area by the Port of Portland Commission." *Id.* at 144.

In response to the application, the Milwaukee and the Southern Pacific filed petitions seeking inclusion as joint and equal owners of Peninsula pursuant to Section 5(2)(b), (c) and (d), 49 U.S.C. 5(2)(b), (c) and (d), and the right to use tracks necessary to connect their own lines with Peninsula's tracks under Section 3(5), 49 U.S.C. 3(5). The Milwaukee and Southern Pacific submissions stated that the participation in Peninsula's control would assure adequate, flexible and efficient rail service to Rivergate, and that exclusive ownership of Peninsula by the SP&S and Union Pacific, which already control the Barnes Yard access terminal, would impede meaningful participation by the Milwaukee and Southern Pacific in Rivergate's planned development. In addition, the Milwaukee independently contended that its inclusion in the proposed acquisition is essential to give full effect to the conditions then proposed in the Northern Lines merger case (and since adopted) to enhance the

Milwaukee's competitive status by giving it direct access to Portland (A. 162, 164, 180–181).

The protective condition referred to by the Milwaukee had been agreed to by the Northern Lines on October 24, 1966 (A. 332), and was one of the reasons for the Commission's reopening its prior disapproval of the Northern Lines merger on January 4, 1967, and ultimately approving the merger. See *Great Northern Pacific & Burlington Lines, Inc.—Merger, etc.—Great Northern Railway Company, et al.*, 331 I.C.C. 228, 231; this subsequent approval of the merger on November 30, 1967, was ultimately affirmed by this Court in the *Northern Lines Merger Cases, supra*. The condition (set forth at A. 327) provides that Milwaukee shall have direct access on an equal basis to Portland and Portland industries over SP&S tracks, which include the track leading to the connection with Peninsula.[4] The record in the reopened Northern Lines case had been concluded and was under submission to the Commission before the application to acquire Peninsula was filed on July 25, 1967, and the Commission's decision approving the merger and adopting the Milwaukee protective condition had been served twelve days before Burlington Northern and Union Pacific responded on December 27, 1967, to Milwaukee's peti-

[4] Milwaukee's point of connection for Peninsula traffic is the Guild's Lake yard on the SP&S line approaching the connection with Peninsula (Map point "2"). Southern Pacific connects to the same line at the nearby Hoyt Street terminal (Map point "3"), as well as to Union Pacific's lines via East Portland (Map point "5") and Albina yard (Map point "6").

tion for inclusion in the Peninsula acquisition.[5] Those responses urged that Milwaukee's inclusion was not required by the Northern Lines condition and was not in the public interest (A. 175, 177). Burlington Northern and Union Pacific also objected to Southern Pacific's inclusion.

C. THE COMMISSION PROCEEDINGS

The Peninsula applications, petitions and responses were referred to a Commission examiner for hearing on a consolidated record. The Port of Portland, the Portland Commission of Public Docks, the Public Utility Commissioner of Oregon, and the Crown Zellerbach Corporation, a major shipper with plants in Rivergate and North Portland Station served by Peninsula, intervened in support of joint control of Peninsula by all four railroads. The intervenors maintained that four-carrier control of Peninsula was essential to the rapid development of efficient and modern rail transportation at Rivergate (A. 199–247). A full evidentiary hearing was held and the examiner filed a detailed recommended report and order (A. 69–133). Noting that the Milwaukee would soon be a line-haul carrier serving Portland directly in accord with the Northern Lines merger condition, the examiner concluded that four-carrier control of Peninsula would promote economical and functionally modern rail transportation for Rivergate and relieve

[5] Two subsequent reports on reconsideration were issued by the Commission. See, 331 I.C.C. 869 (April 11, 1968); 333 I.C.C. 391 (June 17, 1968). The Commission's initial Report and Order denying the merger applications had been rendered March 31, 1966. 328 I.C.C. 460.

existing inefficiencies in Peninsula's services. He further determined that unrestricted ownership would best serve the interests of affected shippers by eliminating existing disparities in switching charges and providing on-line service to the greatest number of points. The examiner therefore recommended approval of the sale of Peninsula's stock control to the SP&S and Union Pacific, conditioned upon the inclusion of the Milwaukee and Southern Pacific on equal terms and the granting of related trackage rights sought by the latter carriers.

Upon exceptions filed by the SP&S, Union Pacific, and others, the Commission (Division 3) limited its approval of the proposed acquisition to the two original applicants, thus giving Burlington Northern and Union Pacific the sole right to control the Peninsula access to Rivergate (A. 11–67). The Commission ruled that the protective conditions adopted in the Northern Lines merger case had no bearing on the Milwaukee's present petition, and that "a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage" (A. 29). The Commission then went on to find that because neither the Milwaukee nor the Southern Pacific had ever directly connected with Peninsula, their direct service to Peninsula's industries would constitute a new operation and an improper "invasion" of SP&S and Union Pacific territory (A. 30–31). In examining the need for service by all four carriers and the competitive effect

of joint ownership the Commission declined to look beyond the past traffic using Peninsula's facilities to the future needs of the growing Rivergate complex. Rather, it found that dilution of the declining demand of Peninsula's historic customers would have adverse effects upon Burlington Northern and Union Pacific that "would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership" (A. 33).

D. THE DISTRICT COURT'S JUDGMENT

The Commission's decision was challenged in the court below by the Port of Portland and the Public Utility Commissioner of Oregon, later joined by the Milwaukee and Southern Pacific. The United States filed an answer supporting the plaintiffs. Without rendering an opinion, the three-judge district court dismissed the complaints in an order and judgment dated July 9, 1970 (A. 9). This appeal by the public bodies and the excluded rail carriers followed (A. 585).*

ARGUMENT

INTRODUCTION AND SUMMARY

This case concerns the rail transportation needs of the great port and industrial facility now being developed at Rivergate. Peninsula Terminal—the last terminal in Portland not controlled by major trunk-line carriers—presently connects with Rivergate's

*The Commission postponed the effective date of its order granting control of Peninsula on December 8, 1969, pending the outcome of these proceedings (A. 583).

northern entry. The southern entry is already controlled by Burlington Northern (SP&S) and Union Pacific on terms designed to exclude other carriers from direct access at that point. Peninsula Terminal is therefore the only existing facility from which the two other carriers directly serving Portland can have equal direct access to the strategic facility at Rivergate. Direct multi-line service by all Portland carriers is essential to the development of the port as an international gateway and as an industrial center in the Northwest. Moreover, without a share in Peninsula, the hard-pressed Milwaukee will not have the ability to serve the developing Rivergate market directly that the giant Burlington Northern and Union Pacific will have; to this extent the competitive promise made to the Milwaukee by the Northern Lines merger conditions will be broken. Moreover, the public served by Milwaukee across the Northern Tier, as well as the public served by Southern Pacific in California and the Southwest to New Orleans, will be denied direct line access to Rivergate, to the detriment of the port's future expansion as well as the needs of the areas served by these lines.

The Commission disregarded these consequences by focussing upon Peninsula's limited present traffic, rather than on the traffic that Rivergate will generate in the future, in contravention of its own precedents and the National Transportation Policy. Moreover it adopted a standard of territorial exclusivity which disregards the public interest in the development of competitive and efficient direct line rail service. Finally, the Commission's decision is inconsistent with the

substance of the Northern Lines condition which specifically afford the Milwaukee direct entry into Portland with the purpose of making it a viable transcontinental competitor of the Burlington Northern.

I. IN FAILING TO FOCUS ITS INQUIRY ON THE FUTURE TRANSPORTATION NEEDS OF THE RIVERGATE DEVELOPMENT, THE COMMISSION APPLIED STANDARDS INCONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY

A. THE APPLICATIONS AND THE PETITIONS FOR INCLUSION CLEARLY RAISED QUESTIONS AS TO THE NEW RIVERGATE PORT DEVELOPMENT AND THE NEED FOR DIRECT RAIL ACCESS TO IT

There can be no doubt on this record that access to Rivergate's future development was the principal concern of the applications of the Milwaukee and the Southern Pacific for inclusion in the Peninsula transaction under Section 5(2), and for terminal rights under Section 3(5). It was as well the concern of the Port of Portland and the other public bodies which intervened in support of those carriers. It is equally clear that Peninsula Terminal's strategic value to the applicant lines, Burlington Northern (SP&S) and the Union Pacific, and hence the reason for their application, was its proximity to Rivergate. The applicants' focus on Rivergate and its future traffic is plainly shown by their application itself, which stressed the new traffic and revenues to be derived within the foreseeable future from Rivergate (A. 144); from the testimony of their officials that the purpose in acquiring control of Peninsula was to obtain direct access and control of Rivergate's northern entrance (A. 380) and to stop Milwaukee and

Southern Pacific from direct access to Rivergate (A. 412, 432, 459, 470); and by the terms of the contract between SP&S and Union Pacific relating to facilities at Rivergate's southern entrance (Barnes Yard), which gave each carrier a veto over any grant by the other of any trackage rights into Rivergate.[7]

Thus the real underlying question in the Commission proceedings was whether the applicants should be allowed exclusive direct access to the traffic to be generated in increasing volume by the industries locating at Rivergate. Without such direct access the other carriers will, as the examiner found, be at a severe service and rate disadvantage which will not only injure them but will deny the port direct on-line service to and from the points they serve to the east

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[7] This contract (A. 303), which was signed on May 26, 1967, provided that the track being jointly built from Barnes Yard into Rivergate was for the exclusive use of SP&S and Union Pacific unless both agreed on a third party's use (Art. I, Sec. 6, A. 305). Article IX provided that the same terms would apply to any other trackage springing from the SP&S line in the direction of Rivergate (A. 313). SP&S General Manager Westergard testified that the contract assured direct joint rail service by the Northern Lines (SP&S, Northern Pacific and Great Northern) and Union Pacific (A. 385) under the same restrictions applicable at Barnes Yard (A. 384).

We point out that this agreement and the February 1967 Peninsula agreement—both plainly designed to exclude Milwaukee (and Southern Pacific) from access to the Rivergate market in Portland—were entered into by the Northern Lines during the very same period when they were urging their October 1966 agreement to give Milwaukee full access to all Portland industries as a major reason for the Commission to allow them to merge in the Northern Lines Proceedings that had been reopened in January 1967.

and south. These disadvantages will take the form of rate and cost burdens and operational delays resulting from switching requirements.

A line-haul railroad which must surrender cars to another carrier for switching to the consignee, or which must have them switched to it from the shipper's facility, must either impose the additional switching costs on the shipper or absorb them itself. It is customary for a line-haul carrier moving a shipment to or from a point where it competes directly with another carrier to absorb the switching costs; if the shipment is moving to or from a noncompetitive point the carrier will ordinarily pass them on to the shipper. Failure to absorb switching costs from competitive points results in a severe competitive disadvantage. Thus, to the extent that Milwaukee and Southern Pacific cannot arrange direct service into Rivergate, they will have either to impose switching costs on their customers, which will discourage use of their lines, or they will have to absorb the costs with a consequent reduction in the revenue available to cover their costs of operation. Either way they will be severely handicapped, since there are practical economic limits on the amount which can be absorbed (A. 212–215, 243–246, 341–342, 346–347, 439–440, 460–466, 470–473).

In addition, there are significant operational disadvantages which a carrier dependent upon switching services of another carrier will encounter. At present over 30 hours are lost in moving Southern

Pacific cars between its Portland interchange points and Peninsula (A. 97). The examiner found that given the short distance involved this is not satisfactory service, and it represents a serious competitive disadvantage (A. 120–121, 123). The Milwaukee suffers a similar disadvantage. Its traffic entering Portland from the north over the SP&S main line, which passes directly by Peninsula terminal, can reach Peninsula only through a connection at the Guild's Lake Yard (map point "2"), about six miles south of Peninsula (A. 100). Its cars bound for Peninsula must then be switched by SP&S back up to Peninsula—a backhaul which requires at least 24 hours (A. 100). Like the Southern Pacific, therefore, Milwaukee can serve Rivergate via Peninsula only with severe operational delays that impair both its service and competitive abilities.[8]

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[8] The Commission has frequently observed that terminal carriers possess an inherent advantage in obtaining the line-haul traffic of industries. See, *e.g.*, *St. Louis Southwestern Railway Co., et al.—Purchase—Alton & Southern Railroad*, 331 I.C.C. 515, 534; *Norfolk and Western Railway Company—Control FP&E Company—Purchase—Fairport, Painesville and Eastern Railroad Company*, 330 I.C.C. 672, 680; *City of Hialeah, Florida* v. *Florida East Coast Railway Co.*, 317 I.C.C. 34, 37; *Control of California Traction Company*, 131 I.C.C. 125, 135–136. The examiner found that (A. 84–85):

"* * * a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching carrier has a solicitation advantage. If Milwaukee has no direct Rivergate access on competitive traffic it must absorb an SP&S switching charge (presently 6 cents a hundredweight) and pay a Peninsula rate division of $29.95 a car when the car revenue exceeds $60, on its traffic which would

These disadvantages are not compensated by the Commission's condition that Peninsula be operated without discrimination and that all existing junctions and gateways be maintained (A. 35–36). This simply institutionalizes the existing disadvantages in rates, service, and competitive ability outlined above.

The importance of multi-line service to the future of Rivergate was strongly emphasized in the record. Rivergate is still in the relatively early stages of its development (A. 199, 229). But it will generate in the future an enormous traffic volume moving to all parts of the nation (A. 201–208), and presents a major opportunity for use of new technology in rail service (A. 209). Evidence submitted by the developers showed that its future as a port and industrial facility will depend significantly upon its ability to offer direct line service on all the major railroads entering Portland. Carriers which cannot offer such service will have little incentive to encourage industries to locate there (A. 207–215, 232), Certain types of industries, such as steel, will require facilities to handle large unit trains. Others will require the most direct movement of containerized ocean cargo by trailer-on-flatcar or container-on-flatcar service. To the extent that such shipments must be delayed for switching, the time and cost advantages of unit train operation and containerization will be lost and the port itself will suffer a disadvantage in relation to other West Coast ports

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move through East St. Johns. * * * The SP&S representative concedes that if Milwaukee owns no part of Peninsula and cannot use the North Portland interchange tracks; it cannot compete equally with SP&S for Peninsula traffic."

(A. 222, 243). The Port of Portland, like other large port facilities, has therefore made multiline service one of the keystones of its development policy for Rivergate (A. 212–213, 219–220).

To be sure, the Port of Portland has not yet finally determined whether the northern access to Rivergate will ultimately be through expanded Peninsula facilities or a new line springing from the SP&S main line in that area, or perhaps some combination of the two (A. 539, 543, 545, 547). But at present, the Peninsula line is the only northern access facility in existence, and it already serves one Rivergate plant. It is plain, therefore, that Peninsula is at the very least a crucial legal and economic foothold for future access, and the parties incontestably approached the Commission proceedings in that light. Thus, the question before the Commission was unavoidably the question whether this one remaining independent access facility, and with it service to Rivergate as a whole, should become the private preserve of Burlington Northern and Union Pacific, or whether it should be opened in meaningful fashion to all four carriers serving Portland.

B. THE COMMISSION'S FAILURE TO CONSIDER THE PUBLIC INTEREST IN MULTI-LINE SERVICE TO THE RIVERGATE DEVELOPMENT WAS INCONSISTENT WITH THE APPLICABLE LEGAL STANDARDS AND THE COMMISSION'S OWN PAST APPROACH TO SIMILAR CASES

In other cases involving the development of similar port and industrial facilities, the Commission has looked upon the needs of the area to be served as a whole, placing the highest value on future rather than historic convenience and necessity. It has emphasized

the traffic potential of developing ports from the broad viewpoint of the nation's foreign and domestic commerce; the needs both of industries now or hereafter to be located in the port for direct, multi-line service; and factors such as elimination of switching charges, improved car movement, expedited land-ocean interchange, and enhanced inter- and intra-modal competition.

In such proceedings the public body charged with development of the port has been heard on behalf of shippers because, in the most real sense, it is the spokesman for the port's future. See, *e.g.*, *"The Calumet Port Case," Illinois Central R. Co. Construction and Trackage,* 307 I.C.C. 493, 527, 529, sustained *sub nom. Illinois Central R. Co.* v. *Norfolk & Western R. Co.,* 385 U.S. 57; *Atchison, T. & SF. Ry. Co. Construction,* 261 I.C.C. 227, 236; *City of Milwaukee* v. *C. & N. W. Ry. Co.,* 279 I.C.C. 521, 526, 530–531. The guiding standard applied with respect to terminal railroads in the past has been that: "In the interest of efficient and economical operation and the free movement of traffic, restrictions in service and discriminations in charges which have arisen from differences in local terminal situations should cease to be a feature of railroad operation." *Consolidation of Railroads,* 159 I.C.C. 522, 523. In short, the Commission's previous decisions in this area have been faithful to the National Transportation Policy (49 U.S.C. preceding Section 1), which enjoins it to administer the provisions of the Act "to the end of developing coordinating, and preserving a national transportation system by water, highway and rail, as well as

other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." Appendix, *infra*, p. 34.

Instead of following these established principles here, the Commission narrowly confined its consideration of the public interest to the limited—and indeed declining—historic traffic of the Peninsula Terminal facility without regard to the new development of the Rivergate port facilities. It gave no reason for this restricted approach except to recite the conclusion that the presence of Southern Pacific and Milwaukee in the general Portland area does not give them the right to serve all industries there (A. 26–27, 30). Looking at Peninsula without regard to the great facility developing beside it, it concluded that direct service by Southern Pacific and Milwaukee to Peninsula "would constitute a new operation and an invasion of the joint applicant's territory" (A. 30). The Commission did not even consider what the foreseeable transportation needs of the Rivergate industrial complex would be, much less find that it would not support the operations of the four Portland rail carriers. Rather, it simply considered the declining traffic served by Peninsula apart from Rivergate, concluding that it would adversely affect Burlington Northern and Union Pacific if they had to share that traffic with others and that, *ipso facto*, inclusion would not be in the public interest.

This narrow approach to the case amounted, we submit, to a failure by the Commission to decide the case the parties presented to it, and, indeed, the case that the National Transportation Policy and Section

5(2) required the Commission to decide before it could conclude that the acquisition without the inclusion of the other carriers was "consistent with the public interest." The Commission did not consider the competitive and other effects of the exclusive control it was giving the applicants over the two rail entries to the real market in issue—Rivergate. It ignored the consequences its decision will have on the Milwaukee and the Southern Pacific's opportunity for access, and on the shipping public's present and future interest in multi-line service there. No mention was made by the Commission of the existing marginal competitive significance of the Milwaukee recognized by the Commission and this Court in *Northern Lines*. See 396 U.S. at 497. Nor was attention given to the need of shippers from, to and through Rivergate for direct line service to the Southwest and the Southeast via the Southern Pacific, which serves a vast area not reached by the applicants. There was no discussion of the comparative benefits to shippers of multi-line service from a developing port facility or of the rate disadvantages and handling delays which attend its absence. Thus, the Commission did not balance the adverse competitive effects that its grant of the application would have, and so did not fulfill the obligations imposed on it by the National Transportation Policy.

It is well established that it is not enough for the Commission to judge a rail acquisition in terms of the private interests of the acquiring and acquired parties. Rather, it is the public interest in optimum rail service that is the touchstone, and that public interest

must be evaluated in particular cases in terms of efficiency, safety and costs as well as the effects of competition. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87. This duty is particularly great where applications under Section 5(2) are involved because any transaction approved by the Commission under that section is relieved from the operation of the antitrust laws. *Northern Lines, supra*, 396 U.S. at 504. The Commission must cast a searching, objective eye upon arrangements carriers have agreed to among themselves, for it has been observed that these giant corporations have a natural tendency " 'to compromise their own differences at the expense of the unorganized public'." *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372, 436, 437 (Brennan, J., concurring). This responsibility extends beyond the provisions of Section 5(2) to every provision of the Act which may affect the choice to be made between monopolistic and competitive service. See *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 492, 495.[9] Cf. *Illinois Central R. Co.* v. *Norfolk &*

[9] Of course the Commission need not follow the identical analysis or make the same findings as would be required in an antitrust suit. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 156–157. But as the *Calumet Port* case makes clear, competitive direct line service is a major factor in the public interest. Cf. *F.M.C.* v. *Svenska-Amerika Linien*, 390 U.S. 238, 245, n. 4. And the Commission has always recognized that because of the limited nature of access to major port facilities and crucial gateways, arrangements for equal access to terminal facilities at such points are essential. Compare *United States* v. *St. Louis Terminal*, 224 U.S. 383, with *St. Louis S.W. Ry. Co.—Pur.—Alton & S.R.*, 331 I.C.C. 515, involving access to the St. Louis terminal and switching district.

Western R. Co., 385 U.S. 57 (affirming the *Calumet Port* case). The Commission's analysis in this case did not even purport to meet that responsibility.

The Commission's adoption in this case of a standard of territorial exclusivity as the standard for evaluating petitions for inclusion in mergers and acquisitions is entirely inconsistent with these principles. The exclusivity standard is apparently derived from cases involving the different matter of authority to construct or extend new railroad lines under Section 1(18) of the Act. But the purpose of that section is, in contrast to the merger section, "to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." *Chesapeake & Ohio R. Co.* v. *United States*, 283 U.S. 35, 42; *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14, 37. And even with respect to new construction, carriers have no legal right to exclusive occupancy of a territory or to protection from loss incidental to competition if the Commission, by applying correct standards, finds that the public interest requires additional service. *Indian Valley Railroad* v. *United States*, 52 F. 2d 485 (N.D. Cal.); *Pennsylvania R. Co.* v. *United States*, 40 F. 2d 921 (W.D. Pa); see *Illinois Central R. Co. Construction and Trackage*, 307 I.C.C. at 527–528; *Chesapeake & Ohio R. Co. Construction*, 267 I.C.C. 665, 679.[10] The application for inclusion in Pe-

[10] Dicta in *Texas & Pacific Ry.* v. *Gulf etc. Ry.*, 270 U.S. 266, 277; and *St. Louis S. W. Ry.* v. *Mo. Pac. R. Co.*, 289 U.S. 76, 81–82, partially quoted by the Commission in its Motion to Affirm (pp. 7–8), do not establish the validity of the principle of

ninsula does not involve any risk of improvident construction, but rather the sharing of a limited facility for the purpose of furnishing multi-line service to a developing port facility. And the Commission has made no finding that the inclusion would cause any harmful diversion of Rivergate's foreseeable rail traffic.

If the Commission's territorial approach here is sustained, then Burlington Northern and Union Pacific will have achieved their admitted purpose (see p. 13–14, *supra*) of foreclosing Milwaukee and Southern Pacific from direct access to Rivergate (A. 412, 432, 459, 470; see also A. 384–385). Since Burlington Northern (SP&S) and Union Pacific alone have previously offered direct single-line service to industries and facilities located in Rivergate, it will be their exclusive preserve, as one Union Pacific official candidly admitted (A. 470). Far from "protecting the territory" of Burlington Northern and Union Pacific from "invasion," the Commission's ruling here will in fact enable these two giants to block the other carriers from effective access to the new Rivergate territory and deny Rivergate industries the service of the other carriers.

The only case cited by the Commission's report (A. 31) for its concept of "territorial exclusivity," *Minneapolis, St. P. & S.S.M.R. Co. Acquisition,* 295 I.C.C. 787, 802, underscores the fallacy of its reason-

territorialization. Those cases were concerned with the right of carriers to enjoin competition from new construction which had not been authorized by the Commission and not the standards the Commission is to apply when determining whether to authorize such construction.

ing. There, the Commission denied applications of other lines to undertake new construction in territory traditionally served on a direct basis by the North Western because the North Western's economic vulnerability made preservation of its exclusive territory important to the public interest. 295 I.C.C. at 798. In the instant case the positions of the parties are precisely reversed: the joint applicants are relatively secure rail carriers, as found in the *Northern Lines* case (328 I.C.C. at 471; 331 I.C.C. at 282–283), while the Milwaukee is a weak line whose service to the Pacific Northwest requires protection (331 I.C.C. at 271; 396 U.S. at 515). Thus, the *Minneapolis* case supports the conclusion that the acquisition of exclusive control of the Rivergate markets by the two strongest rail carriers, to the detriment of a financially weak competitor, is contrary to the public interest. Moreover, given the strength of Burlington Northern and the Union Pacific, the counterbalancing strength of the Southern Pacific would spur them to better service.

II. IN DENYING THE MILWAUKEE'S PETITION FOR INCLUSION, THE COMMISSION ERRONEOUSLY EXCLUDED FROM ITS CONSIDERATION THE CONDITION IT HAD IMPOSED IN THE NORTHERN LINES MERGER CASE EXPRESSLY REQUIRING BURLINGTON NORTHERN TO GRANT MILWAUKEE TRACKAGE RIGHTS TO SERVE PORTLAND INDUSTRIES

In the *Northern Lines Merger Cases,* 396 U.S. 491, this Court sustained the Commission's decision authorizing creation of the powerful Burlington Northern system, of which the SP&S line here in question is a part. The competitive position of the Milwaukee

was a central element in the administrative proceedings leading to approval of the merger, and in this Court's affirmance of the Commission's decision. See, *e.g.*, 396 U.S. at 496–497, 500. The Commission's initial decision disapproving the merger had been based in substantial measure on the adverse impact it would have on the relatively weak Milwaukee, the only source of rail competition for the dominant Northern Lines across the Northern Tier States. 328 I.C.C. 460, 488–500, 528. When the Commission subsequently decided, on reconsideration, to approve the creation of the Burlington Northern, a fundamental justification for its change of position was the merger parties' agreement to protective conditions, by which the Commission found that the Milwaukee "will be substantially strengthened as a meaningful transcontinental competitor" of the combined Great Northern and Northern Pacific. 331 I.C.C. 228, 271–273; see 396 U.S. at 516.

The principal condition intended to strengthen the Milwaukee is Condition 24(a), which for the first time provides for direct access by the Milwaukee into the Portland area by use of Burlington Northern (SP&S) tracks. This Condition, whose adoption was anticipated in the Milwaukee's petition for inclusion in control of Peninsula (See pp. 7–8, *supra*), provides in part (331 I.C.C. at 357; A. 327) that Burlington Northern

> * * * shall grant to the Milwaukee * * * trackage rights to operate freight trains over * * * [Burlington Northern] lines between Longview Junction and Portland, including the

> right to serve on an equal basis *all present and future industries* at Portland and intermediate points and the use of * * * [Burlington Northern] facilities at Portland necessary for the switching of traffic to other railroads and industries. [*Emphasis added*].

This Condition was of crucial competitive importance because, as this Court observed, the Milwaukee's "past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon * * *." 396 U.S. at 515. The condition is necessary, the Court noted (*ibid*), because "[i]n a strictly competitive situation it is understandable that neither of the Northern Lines would interchange traffic with the Milwaukee except on its own terms and this destined that the Milwaukee would fail to become a true transcontinental line even though its western terminus lay within a few miles of Portland with the latter's access to the sea."

By its action here the Commission perpetuates just such detrimental advantages as were previously enjoyed by the Burlington Northern at the expense of the Milwaukee, in what is plainly destined to become one of the leading industrial and port areas in the Pacific Northwest. The promise of the Northern Lines merger, to establish the Milwaukee as a "meaningful competitor" for the vital long-haul traffic between Portland and the Northern Tier States, cannot be fulfilled unless this condition is effectuated in the present context and the Milwaukee is given direct and unconditional access to these important terminal facilities at Portland. For the reasons we have already shown,

the severe competitive and operational disadvantages suffered by a carrier without direct access to Rivergate will gravely impair Milwaukee's Portland service. *Supra* pp. 15–16.

In the Commission's view, the Milwaukee's equal access to Peninsula was not compelled, in letter or spirit, by the *Northern Lines* protective conditions because (A. 29):

> this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of Condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time Condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing

> from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage.

This attempt to explain away the plain language of the Condition—which expressly gives Milwaukee all trackage rights necessary "to serve on an equal basis all present and future industries at Portland"—is, we submit, specious. Whether or not the Peninsula problem was specifically within the Commission's contemplation at the time it approved the Northern Lines merger (after the application and petitions for inclusion had been filed in the instant case) is plainly irrelevant to the operation of the Condition. The Commission made clear in *Northern Lines* that the Condition was imposed in the exercise of its plenary power in Section 5(2) cases to impose conditions necessary to safeguard the public interest. 331 I.C.C. at 286; see also *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 496. The Condition was as broadly phrased as it was precisely because the Commission could not divine every situation that might arise in the future but wished to assure that the competitive assistance being given Milwaukee as the price of the merger would continue to be meaningful. If the Commission can now limit—without any consideration of any competitive justification—the obligation it gravely imposed in *Northern Lines*, if it can now allow Burlington Northern to retract the promise by which its very existence as a merged carrier purported to be justified, the premises upon

which this Court decided the *Northern Lines* case will be largely nullified.[11]

The Commission's argument that the Portland Condition is impotent here because Burlington Northern has entered into contractual relations with Union Pacific is equally unfounded. The short answer to this contention is that the Commission's authority cannot be limited by private contractual arrangements that a regulated railroad chooses to make. As the Commission observed when an attempt was made to narrow another of the Milwaukee protective conditions by private agreement: "Regardless of any understanding the applicants and Milwaukee may have had among themselves however, or the interpretation now put on their agreement, those matters do not bind us and cannot displace our responsibility to condition approval of the merger upon terms required by the public interest." *Great Northern Pacific—Merger—Great Northern,* 333 I.C.C. 391, 393. If Burlington Northern alone had applied for leave to acquire Peninsula, Milwaukee would plainly have been entitled under Condition 24(a) to reach Rivergate directly

[11] It is no answer to declare that the Milwaukee may now seek relief from the Commission in a reconstituted *Northern Lines* proceeding (A. 29). Such a proceeding is unnecessary, as the Commission here acknowledged when it recognized its statutory jurisdiction to consider the Milwaukee's petition in the instant control proceeding (A. 25–26). Requiring the Milwaukee to begin its petition anew in the *Northern Lines* proceeding, in which the Union Pacific is not now a party, achieves nothing which the Commission could not properly accomplish here, where all carriers and affected shippers are present, other than to seriously delay and further burden the Milwaukee's infant Portland operations.

through it. The joinder of Union Pacific with Burlington Northern in a contract relating to Burlington Northern's trackage serving present and future Portland industries, adopted while the Milwaukee conditions involving that same service were before the Commission, cannot lawfully diminish Milwaukee's rights under Condition 24(a). There is no reason why Burlington Northern should be allowed to do jointly what it could not do alone.

In any event, the circumstances of the Burlington Northern-Union Pacific agreement and the temporal sequence of events preclude any argument that Union Pacific's interests should not be affected by the Milwaukee protective conditions. The Northern Lines' agreement to the conditions, on October 24, 1966, preceded by more than three months their agreement of February 28, 1967, with Union Pacific for the acquisition and operation of Peninsula. In the meantime, the Northern Lines merger proceeding had been reopened in January primarily for re-consideration of the Milwaukee conditions, including Condition 24(a), as set forth above, and certain labor agreements. Union Pacific actively participated in the reopened proceeding in opposition to the grant of the Milwaukee conditions and particularly with respect to the entry of the Milwaukee into Portland; the Commission concluded that the public interest in granting the Milwaukee direct and equal access to Portland outweighed the Union Pacific's asserted injury, particularly since "the addition of the Milwaukee as a competitor at Portland would be somewhat offset by the elimination of Northern Pacific and Great North-

ern as separate competitors." 331 I.C.C. at 282–283.

Thus, in view of Union Pacific's awareness of the pendency of the proceedings that eventuated in the Condition before it contracted with Burlington Northern, and indeed its participation in those proceedings, it hardly seems unfair to subject its asserted contractual rights to the Condition. Moreover, the contract by its express terms (A. 146, 156) as well as by operation of law (49 U.S.C. 5(2)(b) and 5(4)) was subject to the Commission's approval and any conditions the Commission might impose in the public interest. And in addition, at the time of the contract Burlington Northern (SP&S) was under an obligation as the signatory and beneficiary of the 1966 agreement with Milwaukee underlying the Portland Condition not to take any action to interfere with Milwaukee's rights thereunder. Union Pacific had a similar obligation as a third party aware of that agreement. Cf. Ann. 83 A.L.R. 33; Corbin, Contracts § 1470; Restatement, Contracts §§ 571, 576.[12] The contract for acquisition of Peninsula was therefore plainly subject to the Commission's approval of Condition 24(a) in whatever form it might finally take.

[12] The agreement between the Milwaukee and the Northern Lines for Milwaukee's entry into Portland, dated October 24, 1966 (A. 332), did not expressly refer to Peninsula Terminal, since SP&S at that time had not contracted to acquire an interest in it. However, it contemplated that Milwaukee would have the right to use SP&S main line, which passes directly by Peninsula Terminal's connection to the SP&S main line (Map, point "7"), into the SP&S yard at Hoyt Street (Map, point "3") "with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points regardless of origin or destination of said traffic." (A. 333, 334)

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the case remanded to the Commission for further consideration in accordance with the standards required by the Interstate Commerce Act and the prior decisions of this Court and the Commission.

Respectfully submitted.

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MAY 1971.

APPENDIX

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Section 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(5) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 3(5), provides:

> 3(5) Terminal facilities; use of and compensation for.
>
> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the prineiple controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5(2), provides in relevant part:

> 5(2) Unifications, mergers, and acquisition of control.
>
> * * * * * *
>
> (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor

carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1971

No. 70-31

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In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

On Appeal From the United States District Court for the District of Oregon

BRIEF OF THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 903

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

On Appeal From the United States District Court for the District of Oregon

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BRIEF OF THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The order and judgment of the district court (App. 9-10) is unreported. The report and order of the Interstate Commerce Commission (App. 11-67) is printed at 334 I.C.C. 419.

JURISDICTION

The judgment of the district court was entered on July 9, 1970 (App. 9-10). The notice of appeal was filed on September 1, 1970 (App. 585-588), and the

appeal was docketed on October 26, 1970. Probable jurisdiction was noted on February 22, 1971. 401 U.S. 906 (App. 589). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2325.

QUESTIONS PRESENTED

Peninsula is a small terminal railroad, less than four miles long, in the Portland area. At the present time it serves fourteen industrial sites along the Columbia River. Originally built as a stockyard railroad to serve a packinghouse facility long since closed, Peninsula's operations at first were conducted by the BN and UP, whose main line tracks adjoin and connect with it via some jointly owned interchange tracks.

When Peninsula was offered for sale by its present owner, BN and UP agreed to buy it and requested Commission approval of the acquisition. Largely because of the future potential of a large and basically undeveloped tract of land at one end of Peninsula's line, Rivergate Industrial District, currently being promoted by the Port of Portland, two other railroads —Milwaukee and SP—requested that the Commission require their inclusion as co-owners. In its report and order, the Commission approved the acquisition of Peninsula by BN and UP, but found that the joint and equal ownership by Milwaukee and SP was not required by the public interest.

The principal question before this Court is whether the lower court properly concluded that the Commission's orders approving the acquisition of control of

Peninsula were supported by substantial evidence and were neither arbitrary nor capricious. Embraced within that issue are the following subordinate questions:

1. Whether the Commission reasonably might conclude that the inclusion of Milwaukee and SP as joint and equal owners of Peninsula was not necessary to render the transaction consistent with the public interest.

2. Whether the ownership of Peninsula by BN and UP will in no way impede the entry of Milwaukee into Portland in implementation of Condition No. 24 of the *Northern Lines* decision.[1]

3. Whether Milwaukee and SP are able to compete effectively with BN and UP for the present and potential traffic of Peninsula and Rivergate without the inclusion of Milwaukee and SP in control of Peninsula and the acquisition of the ancillary trackage rights.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1; Section 3(4) of the Interstate Commerce Act, as amended, 49 U.S.C. 3(4); Section 3(5) of the Act, 49 U.S.C. 3(5); and relevant portions

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[1] This question may not be properly before this Court. Rule 40(d)(2). While appellants raise and argue the point (principal brief, pp. 2, 30-31; supplemental brief of Milwaukee, pp. 1-35), no such question was raised and argued in their jurisdictional statement. The Department of Justice, supporting the position of appellants, did raise this issue at the jurisdictional stage (Memorandum for the United States, pp. 4-9).

of Section 5 of the Act, as amended, 49 U.S.C. 5, are set forth in the Appendix, *infra*.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (App. 9-10) sustaining a report and order of the Interstate Commerce Commission (App. 11-67) authorizing, subject to conditions, the joint acquisition by the Burlington Northern (BN)[2] and the Union Pacific Company (UP) of control of the Peninsula Terminal Company (Peninsula). The Commission's order denied the petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) and the Southern Pacific Transportation Company (SP) for inclusion in the transaction as equal co-owners of Peninsula, and granted no trackage rights linking Peninsula with their lines.

A. Description of Peninsula

Peninsula is a small independent terminal switching railroad at North Portland, Oregon, subject to Part I of the Interstate Commerce Act. *Status of*

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[2] The application was originally filed in the name of SP&S, which was formerly owned equally by the Great Northern Railway Company and the Northern Pacific Railroad. SP&S is now a subsidiary of the Burlington Northern (BN), the new company resulting from the merger of the Great Northern and the Northern Pacific approved by the Commission in its *Northern Lines* decision (*Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 and 331 I.C.C. 869) and affirmed by this Court in *Northern Lines Merger Cases*, 396 U.S. 491, and this family of lines will be referred to hereinafter as "BN".

Public Stockyard Companies, 245 I.C.C. 241 (1941). (App. 14-15, 39-40). It presently serves fourteen industries and is owned by the United Stockyards Corporation (*Stockyard Ry. Co. Control*, 254 I.C.C. 207 (1943)), which no longer desires to operate it. (App. 17, 25, 40).

UP and BN, the only two railroads which physically connect with Peninsula, for many years have interchanged with it cars moving to and from industries on Peninsula, in recent years averaging about ten cars a day, by means of the four-track yard referred to as the North Portland interchange. (App. 204, 361). This yard—jointly owned and operated by Peninsula, UP and BN—links Peninsula with those two line-haul railroads and also serves as an interchange point between BN and UP on certain traffic not originating at or destined to shippers on Peninsula.[3] In addition to the interchange operations, BN and UP provided the line haul for approximately 79 percent of Peninsula traffic in 1966 and 82 percent in 1967. By connections and joint rates and through routes, SP shared in about 20 percent of Peninsula's traffic in 1966 and 17 percent in 1967; under similar arrangements Milwaukee's portion of the cars moving to and from industries on Peninsula during those two years was one percent. (App. 31, 281).

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[3] Peninsula owns a one-half interest in two of the four interchange tracks, with the other half owned jointly by UP and BN. The other two tracks are owned jointly by UP and BN. (App. 17, 25, 41-44, 77-80, 82-84, 92-93, 262-267, 273, 346, 353, 368-369).

Present interest in Peninsula results from the fact that its western terminus borders Rivergate, a sizable but presently largely unoccupied tract owned and being developed as an industrial area by the Port of Portland. (App. 14-15, 39). A study prepared for the Port anticipates that at full development Rivergate will generate a large volume of incoming and outgoing traffic, up to 600 cars a day. (App. 57, 207). At the present time Peninsula serves only one industry and several miles separate the western end of its trackage and the five other industries now located in Rivergate, served by other tracks. (App. 15, 32, 63-65, 135, 233, 427-429, 441-442, 477-479, 551-552, 546-548).[4] Accordingly, any service to future Rivergate industries by Peninsula is dependent upon extensions beyond Peninsula's present tracks.[5]

Whether such extension will ever occur is uncertain. Peninsula suffers from certain physical limitations—its track is built upon sand, its clearances are of limited dimensions, and the line is impeded by heavy curvature. (App. 46-47, 76, 250, 269). An alternate route based upon an extension from the BN main line to Rivergate is under consideration. (App. 15, 46-47). To date, the actual route of the

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[4] The one industry in Rivergate served by Peninsula is Crown Zellerbach's pole yard (located on the east, or Columbia River, side of Rivergate). (App. 15, 39, 135, 233).

[5] BN and UP provide direct service to industries in Rivergate by jointly owned tracks extending from UP's Barnes Yard to the southwestern side of Rivergate, which connect there with those of the Port (App. 15, 45, 48, 477-478, 551-552). By agreement the actual switching is performed by UP (App. 343-344).

tracks into Rivergate has not been selected.[6] (App. 269, 282, 544-545).

B. Proceedings Before The Commission

By a joint application filed July 25, 1967, BN and UP sought authority under Section 5(2) of the Act, 49 U.S.C. 5(2), to acquire control of Peninsula through the purchase of its entire capital stock in equal shares (App. 137-161). Thereafter Milwaukee sought inclusion in the transactions for authority to purchase a one-third share in the control and certain assets of Peninsula and, to permit Milwaukee to connect directly with Peninsula, to acquire trackage rights over the four North Portland interchange tracks, mentioned *supra*, which link Peninsula with the main lines of both BN and UP (App. 162-166, 180-183).[7] SP filed an amended petition and two applications seeking inclusion in the transaction under Section 5(2)(d) as an equal joint owner of Peninsula and acquisition of trackage rights over terminal facilities of Peninsula and UP to enable it to connect with Peninsula at North Portland (App. 167-174).

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[6] Should the route selected be an extension of the BN main line track, BN and UP have assured the Port in writing that they would provide joint service similar to that now furnished via Barnes Yard (see n. 5, *supra*) (App. 47, 269).

[7] Milwaukee's petition was subject to the contingency of implementation of the *Northern Lines* decision, *supra*, a condition in which provided for Milwaukee's entry into Portland over the BN main line from Longview Junction and Vancouver, Wash. At the time of the Commission's instant decision, *Northern Lines* was under review by this Court (App. 15-17, 23-24, 41-42, 163-164, 181-182).

After intervention by Crown Zellerbach Corporation (CZ), the Port, and the Public Utility Commissioner, a hearing on all applications and petitions was held on a consolidated record before a Commission examiner in February and March, 1968. In his report (App. 69-135), the examiner recommended joint acquisition of Peninsula by all four carriers and approval of the trackage rights sought by SP and Milwaukee. Upon exceptions, however, Division 3 of the Commission disagreed. (App. 11-67).

The Commission approved the acquisition of control of Peninsula by BN and UP, subject to conditions. (App. 35-36). It found that it would be in the public interest "for control of Peninsula to pass from the non-carrier, which no longer desires it, to carrier auspices", and further found that, on this record, the "most logical owner would be Peninsula's connecting carriers"—BN and UP (App. 25).

As to the petitions of Milwaukee and SP for inclusion,[8] the Commission first held that for several reasons Milwaukee's petition could not be treated as one to implement the provisions of Condition No. 24 of its *Northern Lines* decision, *supra*, providing for the entry of Milwaukee into Portland and that, accordingly, Milwaukee's petition must be considered under the same public interest criteria as that of SP.[9] The

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[8] The Commission considered the contention that it had no jurisdiction to require the inclusion of Milwaukee and SP, and found such contention to be without merit. (App. 25-28).

[9] The Commission noted that should the Northern Lines merger, the legality of which was at that time being litigated in this Court, be consummated, Milwaukee might seek relief

Commission further found that, judged by such standards, the inclusion of Milwaukee and SP would not "constitute a just and reasonable term, condition, or modification of the authority requested", by BN and UP (App. 33), and accordingly denied the petitions for inclusion and accorded no related trackage rights.

Petitions for reconsideration and for a finding that an issue of general transportation importance was involved were denied by orders of the Commission of October 24, 1969 (App. 579-580) and November 21, 1969 (App. 581-582), respectively.

C. The Decision Of The Three-Judge District Court

After the filing by the Port and the Public Utility Commissioner of a complaint and a motion for a temporary restraining order in the court below and at the request of a judge of that court, the Commission, in December 1969, postponed the effective date of its report and order until further order of the Commission (App. 583-584). Additional complaints were filed separately by SP and Milwaukee. In the court below the Department of Justice urged that the Commission's decision be set aside. By order and judgment of July 9, 1970, the district court, finding that the report and orders of the Commission were supported by substantial evidence and were neither arbitrary nor capricious, dismissed the complaints without opinion (App. 9-10).

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in the *Northern Lines* proceeding regarding the relationship, if any, of Condition No. 24 to Peninsula's tracks (App. 29).

SUMMARY OF ARGUMENT

Appellants' arguments are wholly at odds with the rudiments of transportation economics. The thesis that underlies their pleadings is that a railroad needs to be a joint and equal owner of a terminal railroad in order to serve effectively the industries on the latter's lines. But this is contrary to the widespread and time-honored railroad practice in this country.

It is a fundamental of transportation economics that, although a railroad can reach with its own power only those shippers and receivers of freight situated adjacent to its tracks, it can reach no less effectively all other industries served by rail at common points through cooperative arrangements, most often reciprocal switching. Reciprocal switching arrangements exist at virtually every railroad hub in this country, and Portland is no exception. Even the appellants concede in their briefs that the reciprocal switching districts established by the BN and UP embrace North Portland and the Rivergate Industrial District that is the subject of their concern.

The practice of reciprocal switching extends as well to the terminal railroads serving the railroad hubs of the Nation, and it matters not whether such terminal railroads are wholly independent, whether they are jointly and equally owned union railroads, or whether they are owned by some of the trunk line railroads serving the point. Thus, for example, in the Portland area the Portland Traction Company is jointly owned by the UP and SP, and the Portland Terminal Railroad is jointly owned by the BN, UP

and SP. Yet virtually all of the track of both of these terminal railroads, insofar as they lie within the Portland switching districts, are available on a reciprocal switching basis to each of the trunk line railroads serving Portland.

Peninsula is yet another terminal railroad within the Portland switching district, and the record establishes that the SP has participated in movements to and from the industries served by it just as have the BN and UP, its immediate connections. Now that Milwaukee has been afforded entry to Portland and is itself a trunk line railroad reaching that point, it is able to participate fully in the solicitation of traffic to and from the industries served by Peninsula. That the ownership of Peninsula will have changed from the United Stockyards Corporation to BN and UP will in no way impede that opportunity.

1. The Commission has been faithful to its promises to the Milwaukee—and to this Court—to provide for its entry into Portland, as contemplated by Condition 24 attached to its approval of the *Northern Lines Merger*. Milwaukee has secured trackage rights on the BN between its prior terminus, Longview Junction, and Portland, and (although the record necessarily cannot reflect this) its trains now are operating into Portland as far as the Hoyt Street Yards of the BN. While its power or locomotives do not presently operate over all of the track of the BN within the Portland switching district encompassed by Condition 24, there is no doubt as to Milwaukee's right so to operate, and the movement of Milwaukee

cars by the BN to and from the industries on its lines is performed by BN as agent for the Milwaukee or by some other means.

Under this arrangement Milwaukee can and does have access to Peninsula and the industries on its tracks. Milwaukee's separate brief makes clear that it is content with having BN move its cars to and from Peninsula. Its request for inclusion as a joint and equal owner of Peninsula was designed to protect itself against the possibility that BN and UP might seek to obtain trackage rights on the Peninsula or more favorable rate divisions or switching charges. Milwaukee's concern at this point can best be termed speculative and in any event is within the power of the Commission to guard against under the provisions of sections 5(2) and 3(4) of the Interstate Commerce Act.

2. There is no substance to Milwaukee's suggestion, in its brief to this Court, that its access to Peninsula is dependent upon its participation in joint rates with BN and/or UP, joint rates which would require, for example, its surrender of west bound transcontinental traffic at the Twin Cities. Milwaukee's suggestion ignores that under Condition 23 of the Northern Lines Merger eleven additional gateways were opened to the Milwaukee, permitting it effectively to short haul the BN. More importantly, the suggestion offends completely the fact that, as assured by Condition 24 of the *Northern Lines Merger*, Milwaukee now is a single-line carrier to Portland and can publish local rates to and from

Portland—local rates which apply to all industries within the Portland switching district.

3. The contention that joint and equal ownership of Peninsula by Milwaukee and SP is necessary to overcome handicaps in the physical movements of their cars to and from Peninsula is contradicted by the record and speculative at best. Indeed, Milwaukee expressly disclaims having sought inclusion to bring about a change in the physical handling of its freight. The SP, which does seek to operate its power or locomotives over the track of UP all the way to Peninsula, has failed to demonstrate how its operation will overcome the track congestion and improve service in a manner that the UP has failed to accomplish.

4. Finally, appellants ignore that access to a terminal can be had as effectively through reciprocal switching as it can by direct operations. SP, denied trackage rights to operate over the UP, nevertheless effectively reaches the UP terminus with Peninsula under the reciprocal switching arrangements it long has enjoyed.

ARGUMENT

I.

JOINT AND EQUAL OWNERSHIP OF A TERMINAL RAILROAD IS NOT A PREREQUISITE FOR SERVICE TO ITS INDUSTRIES BY A CONNECTING TRUNK-LINE.

The single thread that unites the appellants in their attack upon the lower court's sustaining of the Commission's order is that, unless the Milwaukee

and SP participate with the BN and UP in joint and equal ownership of, Peninsula, they somehow will be denied the opportunity effectively to serve the industries presently and potentially reached by it. Their concern, insubstantial and unsupported by the record, as we shall discuss, is contrary to the economics of railroad transportation.[10]

It is a basic fact of railroad transportation in America that movements of carloads of freight need not be local to the carrier, that is, that the shippers and receivers need not be situated on the lines of one and the same railroad. Indeed, the railroads of this Nation have welded their lines into a single network affording the shipper with a railroad connection on one of them, access to a receiver with a railroad connection on any one of the others.

Invariably the lines of railroad have converged upon the country's population, manufacturing and marketing centers, and the railroads reaching these points have cooperated among themselves by making the terminal of one the terminal of the others as well. Terminals are opened or unified primarily in two ways. One method is reciprocal switching, an arrangement whereby a railroad retains to itself the ownership and right to operate over its lines but accepts from or turns over to the other railroads en-

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[10] See Bigham and Roberts, *Transportation Principles and Problems* (2d Ed. 1952) 525-528; Pegrum, *Transportation Economics and Public Policy* (1968) 583-587; Taff, *Management of Traffic and Physical Distribution* (3d Ed. 1964) 322-327 and Van Metre, *Industrial Traffic Management* (1953) 355-366.

tering the city the cars consigned to or from industries served by the proprietary company. See *Switching Charges and Absorption Thereof at Shreveport, La.*, 339 I.C.C. 65, 70 (1971). The second method is the organization of terminal companies—railroads that serve industries within the city and switch the cars of trunk line railroads connecting with them. Such terminal companies may be independently owned, may be "union railroads" equally and jointly owned by all of the trunk line railroads serving the city or may be owned by only one or some of the trunk line railroads.

To be sure, joint and equal participation of a terminal railroad by the trunk line railroads connecting with it has in some circumstances been ordered by the courts, *United States* v. *St. Louis Terminal*, 224 U.S. 383 (1912), and by the Commission, *St. Louis SW Ry. Co.—Pur.—Alton and S. R.*, 331 I.C.C. 515 (1968). However, to suggest that such joint and equal ownership is requisite to a connecting trunk line railroad's effective service to and from the industries served by it fails to comport with the requirements of the law.[11]

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[11] Moody's *Transportation Manual* and the *Official Guide of the Railways* offer numerous examples of terminal railroads owned by fewer than all of the trunk line railroads with which they connect. For example, at Detroit the Detroit Terminal Railroad Company, owned by the Grand Trunk Western Railroad and the Penn Central Transportation Company, connects with the Chesapeake & Ohio Railway and the Norfolk & Western Railway as well. Similarly, in Washington the Washington Terminal Company, owned by Baltimore & Ohio Railroad Company and the Penn Central Transporta-

It is too well established to permit of doubt that terminal railroads are common carriers within the meaning of the Interstate Commerce Act. *United States* v. *Brooklyn Terminal*, 249 U.S. 296 (1919); *United States* v. *Union Stock Yard*, 226 U.S. 286 (1912). As such, the terminal railroads are obliged to serve equally and without discrimination all who tender it traffic. *Union Pac. R. Co.* v. *United States*, 313 U.S. 450, 451-452, 456-457, 460-461, 464-467 (1941); *United States* v. *Union Stock Yard Co.*, 226 U.S. 286, 299-301, 303-309 (1912); *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 501-505, 520-523, 524-527 (1911).

Peninsula is such a terminal railroad. Organized in 1918 as a stockyard railroad in connection with a packinghouse situated in the North Portland area (App. 263), the operations of its lines were conducted by the BN and UP until 1930 when Peninsula undertook to perform its own operations. (App. 263-264). It presently operates two diesel locomotives to pick up and set out loads (App. 250-251). Connections with the BN and UP are made on a jointly owned interchange track (App. 262, 264-266, 284), and an average of ten carloads of freight are handled between them daily. (App. 204, 361). Peninsula receives a division of the line-haul rates that apply, and these divisions normally are absorbed by the connecting carriers. (App. 254, 258, 285). Peninsula has maintained complete neutrality as be-

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tion Company, connects with Chesapeake & Ohio Railway, the Richmond, Fredericksburg and Potomac Railroad Company and the Southern Railway.

tween its connecting carriers. (App. 255). Following purchase of Peninsula by BN and UP, the present officers and management will continue to operate the railroad (App. 256, 267), and the new owners will continue the policy of neutrality (App. 285, 359).

II.

INCLUSION OF MILWAUKEE WAS NOT REQUIRED TO IMPLEMENT THE NORTHERN LINES DECISION OR TO AFFORD MILWAUKEE ACCESS TO THE INDUSTRIES SERVED BY PENINSULA.

A. Milwaukee Now Serves Portland Pursuant To Condition 24 Of Northern Lines and Connects With Peninsula.

A basic condition of the Commission's approval of the merger of the Great Northern Railway Company, the Northern Pacific Railway Company and their affiliates, including the Spokane, Portland and Seattle Railway Company, was that Milwaukee be made an effectively competitive transcontinental carrier by, among other things, affording it entry to Portland. *Great Northern Pac. & B. Lines, Merger —Great Northern*, 331 I.C.C. 228 (1967), aff'd *Northern Lines Merger Cases*, 396 U.S. 491 (1970). Milwaukee, whose lines had terminated at Longview Junction, Oregon, some 46 miles north of Portland, had resisted the merger proposal, claiming that, unless appropriately conditioned, the creation of the new company would so completely engulf it as to render it unable long to survive. While the proceeding was pending before the Commission, the appli-

cants acceded to Milwaukee's request for conditions, among them Condition No. 2, providing Milwaukee entry into Portland and trackage rights over the lines of the BN between Longview Junction and Portland necessary to effect such entry (App. 332). That requirement reads, in part, as follows:

> 1. To the extent that New Company or SP&S can do so, it will grant to Milwaukee trackage rights over present Northern Pacific and SP&S tracks between Longview Junction, Washington, and Portland, Oregon including all main, second main, passing and industry tracks, and over SP&S tracks in the Line D valuation area in Portland, and the right to construct at its own cost any necessary cross-overs, to enable Milwaukee to operate freight trains, engines, and cars between Longview Junction and the Hoyt Street freight yard of the SP&S in Portland, with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points regardless of origin or destination of said traffic.
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> * * * *
>
> 11. To the extent that New Company or SP&S can do so, it will at the request of Milwaukee and in a fair and impartial manner perform at joint facility costs the switching of Milwaukee cars at Kalama, Vancouver, and Portland to or from industries and connecting carriers to the extent such service is performed by New Company or SP&S for itself or any other carrier. [App. 333-335.]

The agreement between the parties was largely incorporated by the Commission as a condition to its approval of the *Northern Lines Merger*. Condition 24 (331 I.C.C. 228, 357; App. 327) provides, in part:

> 24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission.
>
> (a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers;

Milwaukee commenced its service to Portland on March 22, 1971. As of that date Milwaukee has been able to render single-line service to Portland from its on-line points in the Midwest and to publish rates reflecting such service. See, *e.g.*, *Corn & Soybeans, Midwest to Pacific Northwest*, 339 I.C.C. 465, 466-

467 (May 12, 1971).[12] By virtue of its trackage rights over the lines of BN, it has operated its own locomotives as far south as the Hoyt Street Yard.

The BN line over which Milwaukee has trackage rights crosses over the tracks of Peninsula at North Portland, and there are jointly owned turnout and interchange tracks affording a connection between the two lines (App. 262, 264, 265-266, 284). As a practical matter, BN has not switched cars to Peninsula from trains operating through on its own main track but has pulled such cars from Vancouver in switch or transfer movements (App. 46).

At the time of the hearings in this case, it was not certain how the Milwaukee cars would be handled by BN after Milwaukee was afforded access to Portland (App. 373-374, 437). The witness for the Milwaukee declared that the best service it could provide to this area would be to set out and pick up cars at North Portland with its road trains; however, if the pattern of operations over the BN track would not permit this, he was certain an efficient

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[12] In *Corn & Soybeans* Milwaukee had originally proposed to establish a new reduced all-rail multiple-car rate on corn and soybeans, in bulk, from points in the Midwest to Longview, Seattle, and Tacoma, Wash., for export, via its lines direct. After March 22, 1971, Milwaukee proposed to extend the application of the proposed rate to Portland as well as the intermediate points (between Longview Junction and Portland) of Kalama and Vancouver, Wash. In addition to finding the Milwaukee's original proposal to be just, reasonable, and otherwise lawful, the Commission also noted that it had voted not to suspend the proposed application of the rate to Portland and the other two involved cities (339 I.C.C. 465, 467, 474). The proposed rates became effective on May 19, 1971. Reconsideration petitions are pending.

means of interchanging the traffic via North Portland could be worked out (App. 331, 529). An alternative would be to have BN transfer the Milwaukee cars from Vancouver to North Portland for handling in the same way that BN cars are handled (App. 376-377). A third means of handling the Milwaukee cars to and from Peninsula would be to have the BN handle the cars between Hoyt Street and North Portland, as provided for in the October 24, 1966, agreement (App. 334-335).

Milwaukee does not need a share in ownership in Peninsula and/or a direct connection with Peninsula to permit it to provide the shippers or receivers on Peninsula the benefits of single-line rates between Portland and its Midwest points. Even now, the record shows SP handles substantial line-haul traffic to or from industries on Peninsula although such movements require both switching by Peninsula and an intermediate movement by either BN or UP between Peninsula and the SP terminus in East Portland. Notwithstanding, SP publishes its rates on carload traffic as if those industries were on its line and absorbs the switching charges subject to receipt of a certain through minimum charge per car and with the exception of certain non-competitive traffic (App. 61, 347-348, 468-469).[13]

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[13] Peninsula is compensated for its switching services performed for the line-haul carriers by a division of the published rate. Although SP and Milwaukee do not presently connect with Peninsula, they, as well as BN and UP, now absorb Peninsula's division, so that no such charge is passed on to the shipper on Peninsula (App, 43, 254, 258-259, 284-285, 347).

Milwaukee does not need and does not want equal and joint ownership in Peninsula in order to operate its power equipment to and from the industries served by it. Its brief clearly and finally removes any doubt on this score, when it says, "Milwaukee never sought to switch cars to Peninsula's industries with its own engines and crews." [14] Its main purpose in seeking joint and equal ownership of Peninsula is to assure it that BN and UP will not use their ownership of Peninsula so as competitively to disadvantage the Milwaukee. Thus at App. 342 the witness for the Milwaukee explained that "[t]he owning companies * * * can obtain trackage rights by mutual agreement over Peninsula so that industries served by Peninsula are on-line industries for them." But what Milwaukee fails to recognize is that Peninsula will remain a separate railroad; the transaction approved by the Commission was for its control and not its merger. See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, 265 (1962), sustained, *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963), aff'd *per curiam*, 375 U.S. 216. BN and UP will be unable to operate their equipment on Peninsula track even if they want to do so unless they secure authorization therefor from the Commission pursuant to section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2) (App. 386) — and the record indicates that it is unlikely that

[14] Supplemental Brief of Milwaukee, at p. 34.

BN and UP will seek to operate Peninsula (App. 366-367).[15]

Secondly, and perhaps more importantly, Milwaukee professes the fear that BN and UP will use their ownership to fix the charges for Peninsula's services, to be absorbed by Milwaukee or paid by the shippers using Milwaukee if not absorbed, in such a way as to disadvantage the Milwaukee in serving the industries reached by Peninsula (App. 342). Here, again, Milwaukee conveniently ignores that Peninsula is a terminal railroad and as such cannot, even if it were so inclined, discriminate in the assessment of charges between connecting lines. See discussion at p. 16, *supra*. Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), specifically provides that railroads subject to its requirements, such as Peninsula, "shall not discriminate in their rates, fares, and charges between connecting lines." That a terminal railroad cannot assess one connecting carrier a higher charge than another for like switching services is no longer open to question. *Sioux City & N. O. Barge Lines, Inc.* v. *Chicago & N.W. Ry. Co.*, 303 I.C.C. 537; *Federal Barge Lines, Inc.* v. *Alton S. R.*, 303 I.C.C. 669. It seems clear that Peninsula "cannot lawfully interchange traffic with other independent trunk lines under a reciprocal switching arrangement and at the same time refuse to enter into a like arrangement with complainant." *Chicago, Lake Shore &*

[15] The Department of Justice mistakenly assumes that BN and UP upon acquiring control will be able to operate on Peninsula. Brief, pp. 6, 12, 14.

S. B. Ry. Co. v. *Director General*, 58 I.C.C. 647, 654 (1920) aff'd *sub nom.*, *Chicago, I, & L. Ry.* v. *United States*, 270 U.S. 287 (1926).

To the extent the Department's argument of competitive disadvantage to Milwaukee and SP is premised upon the custom of a line-haul carrier passing on switching charges on a shipment moving to or from a noncompetitive point (Brief, at 15), such contention, for all practical purposes, no longer has any relevance to the instant situation. Since December 5, 1969, the single-line rates of all line-haul railroads serving Portland have been applicable to all industries in the general Portland terminal area, including those on Peninsula, as a result of the so-called Presidents' Conference agreement. This agreement, applicable to the entire North Pacific Coast Territory (Oregon, Washington, and Northern Idaho), eliminates non-competitive switching charges by the establishment of a single basis of switching charges on carload traffic at all common points within the Territory and provides for absorption of the switching charges of intermediate carriers by the line-haul carriers.[16] Under that agreement, all industries within the Portland Switching District—which includes both Rivergate and the North Portland area served by Peninsula—are now on a competitive relationship, regardless of whether or not they are directly served by the carrier providing the line-

[16] The agreement is subject to two exceptions. It does not apply when the line-haul minimum revenue is less than $100 a car after absorption or when a participating railroad specifically excludes a certain tariff item (App. 285-286).

haul on a certain movement. (App. 52-53, 285-286, 351-352). And since March 22, 1971, Milwaukee—as a railroad in Portland—is able to participate in this arrangement and thereby normally afford Portland shippers not on its line, such as those on Peninsula, the benefits of its single-line rates without the shippers' payment of a switching charge of an intermediate carrier.

B. Milwaukee Has Published Single-Line Rates Into Portland Pursuant To Condition 24 and Can Absorb The Charges of Peninsula.

Milwaukee would have this Court believe that it is able to connect with Peninsula only upon through routes and joint rates established with BN or UP, requiring the surrender of shipments at gateways assuring the connecting carriers their long haul. Thus, for example, at page 15 of its brief, Milwaukee says that, as a result of the assailed report and orders of the Commission,

> * * * Milwaukee would continue to participate in traffic to or from Peninsula via joint rates with either Union Pacific or SP&S or one of the latter's parent lines via existing junctions. The existing junctions on transcontinental traffic so far as Milwaukee is concerned, would be Twin Cities or Missouri River gateways and, to a limited extent, via Marengo, Washington in connection with Union Pacific, and on Mountain Pacific traffic and north-south traffic, via Marengo, Tacoma and Chehalis, Washington.

Again, at page 28 of its brief, Milwaukee declares that by its decision the Commission has perpetuated

a "rate policy that prevented Milwaukee from being a rate-making line to Portland and discouraged the publication by Milwaukee of joint rates to and through Portland because it was forced to use short haul off-junctions with nothing in the return direction."

There is no basis whatsoever for Milwaukee's assertion that its access to Peninsula is dependent upon its participation in through routes and joint rates with BN or UP, such as would require its surrender of cars at such distant points as the Twin Cities or Tacoma.

Such may have been the handicaps under which Milwaukee had to operate in the past in seeking to serve Portland and points beyond. However, as a result of the *Northern Lines Merger Cases*, these impediments were removed, and it would be a cruel distortion to think that in the assailed report and orders the Commission attached traffic conditions (App. 35-36)[17] so as to deny Milwaukee the protection it had previously been granted.[18]

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[17] The traffic conditions are generally the same as those first prescribed in *Detroit, T. & I. R. Co., Control*, 275 I.C.C. 455, 492 (1950), sustained, *New York, C. & St. L. R. Co.* v. *United States*, 95 F. Supp. 811 (N.D. Ohio 1951).

[18] The traffic conditions imposed by the Commission are another means by which Milwaukee, as a railroad in Portland, can be an effective competitor for Peninsula's traffic without its inclusion and without its direct access to Peninsula. The eight conditions imposed by the Commission obligate Peninsula, SP&S, BN and UP to treat the pertinent traffic of SP and Milwaukee via the present routings and interchanges on a nondiscriminatory basis, vis-a-vis their own Peninsula traffic (App. 35-36, 271-272). Any circumstance which Milwaukee

Milwaukee's assertion, first, ignores the fact that Condition 23 of the *Northern Lines Merger Cases*, 331 I.C.C. at 356-357, as modified at 331 I.C.C. 887, *supra*, opened to it the junctions and gateways at Linton and Fargo, North Dakota; Miles City, Judith Gap, Great Falls, Bozeman, Butte and Missoula, Montana; and Spokane, Seattle and Tacoma, Washington. Milwaukee and BN, in response to this condition, have published through routes and joint rates via these points; and Milwaukee presently is operating via these junctions, effectively short hauling the BN. Thus, even if it were true that Milwaukee's access to the Peninsula industries obliged it to participate in through routes and joint rates with the owning roads, it would not be denied the long-haul movements and the revenues earned therefrom as it maintains.[19]

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regarded as a violation of these conditions by Peninsula and/or the carriers controlling it would be subject to complaint before the Commission. Moreover, inasmuch as the effective date of the Commission's order has been postponed pending completion of this litigation, the "present routings and interchanges" referred to in the conditions arguably also may cover any routings and interchanges established by Milwaukee for the handling of Peninsula's traffic since its entry into Portland.

[19] This Court's decision in *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 366 U.S. 745, is not to the contrary. The conclusion that a railroad under the control of other railroads cannot, in the absence of certain findings, be compelled to enter into a through route and joint rate arrangement which would have the effect of short-hauling its parent lines seems to be limited to line-haul operations, and has no application to the type of switching operations performed by Peninsula. Moreover, the general standards governing the relationships of competing railroads have been superseded, in the case of Milwaukee, both by the conditions

Far more significant, however, is the fact that Milwaukee has published single-line rates to Portland; Condition 24 in the *Northern Lines Merger Cases* assured it of the right to do so. And when, beginning March 22, 1971, Milwaukee undertook to operate its trains to and from Portland, under the trackage rights obtained from BN as a condition to the merger, Milwaukee became a ratemaking transcontinental railroad, as the Commission assured it it would be. Since that date it has had in effect single-line rates to and from Portland, and in no way is Milwaukee any longer dependent upon the successful negotiation of through routes and joint rates with BN or UP in order to reach Portland on transcontinental or coastal traffic.[19a]

In the final analysis the present controversy, as far as Milwaukee is concerned, involves no more than whether the movement of its cars to the interchange tracks affording access to Peninsula shall be upon the switching charges as published in the applicable tariffs or upon contract charges negotiated with BN. There is no controversy that Milwaukee's cars can be switched to and from the interchange tracks affording access to Peninsula and the industries beyond, and the owning roads, BN and UP, concede that Milwaukee would be entitled to have this switching performed

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imposed in *Northern Lines* and, with specific regard to Peninsula, by the conditions imposed in the instant case regarding the non-discriminatory treatment by BN and UP of Milwaukee traffic.

[19a] See Milwaukee ad, *The Wall Street Journal*, June 21, 1971, p. 5.

under the normal tariff switching charge—at the time of the hearing six cents per 100 pounds. (App. 439).[20]

Moreover, a persuasive argument can be made that under Condition 24 of the *Northern Lines Merger Cases* Milwaukee is entitled to trackage rights upon the main lines of the BN and as much of the spur tracks extending from them as may be necessary to permit an interchange with connecting railroads. Insofar as Milwaukee elected to have BN perform the movements to and from Peninsula for it, as its agent, the joint-facility contract charge to Milwaukee would be something less than the normal tariff switching charge.

As far as the Commission is concerned the question of the compensation to be paid BN for the movement of Milwaukee cars to and from the interchange track affording the connection with Peninsula remains open. Nothing in the report and orders of the Commission gives comfort to the contention of the owning roads that, since Milwaukee can operate on none of the jointly owned interchange tracks, they have no alternative but to assess the tariff switching charge. On the other hand, neither is there anything in the Commission's report and orders that declares that Milwaukee has the right to operate its trains onto the interchange track and that, therefore, the rendition

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[20] The record indicated that if Milwaukee became a carrier in Portland, it would absorb whatever charges were necessary to make it competitive with the other line-haul carriers operating in that city (App. 528, 531-532). As seen, Milwaukee has in the past, even as a carrier not in Portland, absorbed Peninsula's division (n. 13, *supra*).

of service by BN in its stead can be upon the negotiated contract charges.

If Milwaukee should find itself unable successfully to negotiate with BN and UP to have its cars moved from and to the interchange tracks upon the contract charges—an effort that Milwaukee has not yet fully pursued—and if, moreover, Milwaukee's absorption of the switching charges, as well as of the division that it, as any other railroad, is required to pay Peninsula (App. 439), should prove so burdensome as to preclude its effective participation in the handling of traffic to and from Peninsula and the industries beyond, the Commission provided the vehicle for relief. Condition 8 of its approval of Peninsula acquisition by BN and UP (App. 36) provides:

> Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

Such a reservation of jurisdiction was an obviously appropriate exercise of the Commission's power to impose conditions implementing the criteria of section 5(2)(d) of the Interstate Commerce Act as to the public interest in the inclusion of a railroad in a considered acquisition of control. Such conditions have been imposed by the Commission for at least forty years. *Alton R. Co. Acquisition and Stock Issue*, 175 I.C.C. 301, 313 (1931); *Union Pacific R. Co. Unification*, 189 I.C.C. 357, 363-364 (1933). And even in the

absence of the express reservation of jurisdiction to reopen the proceeding, the Commission would have enjoyed the power to modify the terms of its report and orders as may be necessary to afford Milwaukee effective and competitive access to the industries served by Peninsula, under the explicit statutory authority of section 5(9) of the Interstate Commerce Act. *City of New Orleans* v. *Texas & N.O. Ry.*, 195 F.2d 882, 886 (5th Cir. 1952); *City of New Orleans* v. *Texas & Pac. R. Co.*, 195 F.2d 887, 889 (5th Cir. 1952).

III.

NO SERVICE IMPROVEMENTS WOULD RESULT FROM AFFORDING MILWAUKEE AND SP JOINT AND EQUAL OWNERSHIP WITH ATTENDANT TRACKAGE RIGHTS.

The Department of Justice supports the appeal of the Milwaukee for the reason, among others, that its access to Peninsula and the industries beyond through switching arrangements with BN is subjected to "severe operational delays that impair both its service and competitive abilities." [21]

The Milwaukee, however, before this Court voices no such complaint, and the contentions advanced in this regard on behalf of the Milwaukee by the Department of Justice are not made by the Milwaukee itself. On the contrary, as we previously pointed out, Milwaukee specifically disclaimed any desire to operate its trains directly into Peninsula, stating: "Milwaukee never sought to switch cars to Peninsula in-

[21] Brief of the United States at p. 16.

dustries with its own engines and crews."[22] Milwaukee is perfectly content to have BN switch its cars, preferably from Vancouver or alternatively from Hoyt Street Yard.

Indeed neither Milwaukee nor any shipper served by Milwaukee offers any complaints as to the switching service performed by BN of Milwaukee cars to and from Peninsula. Neither Milwaukee nor any shipper served by it premised its inclusion as a joint and equal owner of Peninsula on the expectation that service thereby would be improved. The Department is wholly in error in contending that Milwaukee "can reach Peninsula only through a connection at the Guild's Lake Yard,"[23] which some witnesses estimated would require a backhaul and a 24-hour delay. (App. 213, 331). The record establishes—and BN agrees—that there is no reason why the Milwaukee cars cannot be handled by BN in a transfer movement from Vancouver, which would occasion no backhaul at all (App. 377); and possibly, upon further negotiation, Milwaukee's cars could be set out at East St. Johns, about a mile from the interchange tracks leading to Peninsula. (App. 391).

As for the SP, which did profess a desire to operate its trains directly to the Peninsula industries by trackage rights over the UP, there is ample evidence of record that such operations would be impractical (App. 269). The line that runs between the Albina

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[22] Supplemental Brief of Milwaukee at p. 34; see also statements at pages 18, 26.

[23] Brief of the United States at p. 16.

Yard, to which the SP now operates under an arrangement with UP, and the interchange track at North Portland is a single track (App. 402). At its northern end it runs through a mile-long tunnel which must be kept clear lest gaseous conditions develop (App. 569). There already are some forty to fifty trains operating on this single track each day, and to permit the SP to operate over it, as it seeks to do, would add to the congestion that already exists (App. 277, 397, 404).

The Albina Yard, a large yard having more than forty tracks, already is used to capacity (App. 277, 401). All of the tracks are used for yard classification movements, and to attempt to open a through track for the operation of SP trains would disrupt the yard functions (App. 423-424). Southern Pacific's proposal, ostensibly based on its dissatisfaction with the thirty hours or so now consumed in getting its cars to and from Peninsula (App. 398), does not take into account that its cars as tendered to UP at Albina are not presorted (App. 504), and must be switched, inspected, tested, and otherwise processed for handling to their several destinations (App. 420-421). Neither does the Southern Pacific proposal take into account the delays occasioned by the operation of switch engines performing the many movements in the area (App. 566, 568). In short, Southern Pacific's operations over the UP track would add further congestion, would be uneconomical and wasteful, and ultimately would be of no benefit to the public (App. 269-270, 570).

Indeed, there have been few, if any, complaints by the shippers of the SP arising from the switching performed for it by the UP on movements to and from Peninsula (App. 571, 574).[24] The largest of the shippers, Crown Zellerbach, has made allowances for the present operating schedules and has accommodated itself to them (App. 449). Although it supported SP in its effort to secure joint and equal ownership of Peninsula and related trackage rights (App. 302), its support was premised largely upon a desire to secure more special purpose cars (App. 302, 444, 454) —a goal that the Commission found (App. 32) would not be furthered by four-way control.[25] It also sees in its support of the applications a possible means for effecting the rebuilding of the line of Peninsula as

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[24] To show the purported delay in the handling by UP and BN of SP's cars between that carrier's Brooklyn yard in East Portland and Peninsula, SP relied in part on a random ten percent sample of shipments (App. 6, Vol. IV, Tr. 521, 549; App. 315, 317, 521). In view of the adequate explanation of several of the items by a UP witness (UP handled the great majority of the involved movements) (App. 571-576) and the failure by SP to link these movements with complaints by specific shippers (App. 6, Vol. IV, Tr. 520-524; App. 514-515), SP's exhibit did not establish the inadequacy of the handling of that carrier's Peninsula traffic by UP and BN.

[25] SP's witness testified that he did not believe that direct access to Peninsula by SP would increase its ability to furnish empty cars (App. 508) and Milwaukee's witness acknowledged that, when it became a carrier in Portland, its car supply would be available for a shipper on Peninsula, regardless of whether Milwaukee operated its own trains on the North Portland interchange or contracted with the owning lines for the handling of Milwaukee's Peninsula traffic (App. 529).

would be necessary to its use of larger 85-foot cars (App. 454), although the Commission found that four-way control would not result in "any greater likelihood of track realignment". (App. 31-32).

The three shippers located on Peninsula who supported the UP and BN application had no complaints concerning the handling by those lines of cars moving to or from Peninsula (App. 291-292, 474-476; 292-293, 494-497; 294, 484-494). Moreover, a UP witness stated that if Peninsula is the alternative chosen to serve Rivergate, and if Rivergate developed to the extent projected by the testimony of the Port, UP would furnish service as needed (App. 574).[26]

Two other shippers, Oregon Steel Mills and Collier Carbon & Chemical Corporation, were, at the time of the hearing, both in the process of constructing facilities on the Willamette River side of Rivergate, some three or four miles from Peninsula's western terminus. When completed, both companies will be served by UP and BN through the trackage from UP's Barnes Yard. (App. 233, 428-429, 479). While the witnesses for both companies expressed a desire for single-line SP service, this could only occur if the projected tracks beyond the Peninsula tracks are in fact extended so as to reach their sites.

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[26] A witness for the Portland Commission of Public Docks, while favoring four-railroad ownership of Peninsula (App. 246), indicated that UP, which performed the switching at the Commission's Terminal Number 4 in Portland [located to the southeast of Rivergate (App. 233)], had performed "* * * a yeoman job, often going far out of its way to help us when the need arose." (App. 246-247).

The testimony of these shippers underscores the very tenuous and speculative basis of the appeal of the public appellants. Their case, in the final analysis is premised upon two assumptions: first, that the Rivergate area will be developed as the significant source of railroad traffic that they envisaged; and, second, that Peninsula will be selected as the connection for railroad service to and from the area. As previously discussed, it is far from certain that either of these assumptions will ever materialize.

In sum, no service improvements would necessarily result from inclusion of SP or Milwaukee as co-owners of Peninsula. Milwaukee does not even claim any such improvements, and the hopes of the SP witnesses are predicated upon the assumption that Peninsula's tracks will ultimately be extended into Rivergate. Clearly such insubstantial and speculative testimony afforded no basis for requiring inclusion.

IV.

VARIOUS OTHER CONTENTIONS ARE WITHOUT MERIT.

A. The Commission Gave Full Consideration To The Evidence Concerning Rivergate.

Contrary to appellants' repeated assertions, the Commission by no means "ignored" the evidence concerning the present and potential future traffic of Rivergate which, under one alternative, Peninsula might some day handle. Rather, the evidence adduced both by potential shippers and the public agencies sponsoring the Rivergate development was considered by the Commission in some detail. (App. 21, 23, 30-

33, 57-61), and its ultimate decision denying the inclusion petitions of Milwaukee and SP was based upon an evaluation both of present Rivergate traffic and the future potential.

We suggest that appellants' real quarrel is with the Commission's evaluation of the Rivergate evidence—a matter which this Court has repeatedly emphasized is for the judgment of the agency rather than a reviewing court. *Illinois Central R. Co.* v. *Norfolk & Western R. Co.*, 385 U.S. 57, 66, 69 (1966); *Assigned Car Cases*, 274 U.S. 564, 580-581 (1927). And the Commission's conclusion that the evidence as to Rivergate did not justify the inclusion of two additional carriers in control of Peninsula was entirely rational and well within its discretion.

At the time of the proceedings before the Commission, Rivergate—a logogram for a tract of marsh land in the North Portland area at the confluence of the Columbia and Willamette Rivers—was in the initial stages of development (App. 199, 218, 229). With little or no railroad track, with little or no roads, with little or no port facilities, only about 10 percent of the acreage was usable, and the remainder required extensive fill and other work, extending to 15 or 20 years, if the area's potential was to be realized. (App. 199-200, 510-511, 543).

Rivergate held only five industries (App. 200). Four of these, situated at the southwestern part of the property along the Willamette River, were reached by track of the Port of Portland which connected with the line built jointly by the BN and UP. (App. 380). Within the Rivergate area, only the Crown Zellerbach

pole yard at the northeastern edge of the property is within reach of Peninsula's tracks. And since the close of the record in 1968, only three additional industries have located on Rivergate—all on the Willamette River side of the development, beyond reach of Peninsula's tracks.

It is far from certain that Rivergate will ever become the major industrial development the public appellants hope to achieve. And even if their hopes are realized, it is highly uncertain that the necessary rail lines will be built as an extension of Peninsula's trackage. As previously noted, Peninsula suffers physical limitations that impede its utilization to serve the needs of the Rivergate area operating at its maximum potential. Its track is built upon sand, its clearances are of limited dimensions, and the line is impeded by heavy curvature. (App. 250, 269). The operation on its track of unit trains, essential to the development of Rivergate (App. 209), would require the realignment of Peninsula trackage (App. 537-539). Finally, the public support for inclusion is premised upon the owners' operation in their own right on the Peninsula tracks (App. 215), a premise that the appellant, Milwaukee, itself does not support.

As previously discussed, the northeastern end of Rivergate along the Columbia River may ultimately be served, not by Peninsula at all, but by a new line extending from the main line of the BN. (App. 269, 538, 544). BN and UP have given the Port of Portland written assurances that if and when such line is constructed they will render joint services similar to that which they already are providing on the

southeastern shore along the Willamette River. (App. 295-299, 388-389).

In this state of the record, four-way control of Peninsula plainly was not required solely upon the speculation that Peninsula might some day be extended to serve an area which might some day be heavily developed. This is particularly so since, as previously demonstrated, any industries ultimately reached by Peninsula can readily be served by both Milwaukee and SP, without regard to their participation as co-owners in Peninsula. Thus the Commission's decision was based upon full consideration of the evidence as to Rivergate, and can in no way impede its future growth and development.

B. The Commission Properly Gave Weight To The Historic Presence of BN and UP in the Peninsula—Rivergate Territory.

There is no basis for appellants' attack upon the Commission's conclusion that the Peninsula-Rivergate area has historically been the "territory" of BN and UP, thus bolstering the propriety of their accession to control of Peninsula. Even before Rivergate was developed and BN and UP undertook to meet its transportation requirements (App. 382), these two railroads were committed to the development and service of this area. Prior to Peninsula's formation in 1918, BN and UP themselves performed the necessary switching function for industries in the area. From 1918 until 1930 (when Peninsula became independent), BN and UP performed the switching operations under lease from Peninsula,

and thereafter Peninsula performed its own operations. (App. 263-264). During all this time, BN and UP have performed the interchange for all of Peninsula's traffic and, additionally, have performed the line-haul operation on the vast bulk of Peninsula's traffic.

Adjacent to the Rivergate area is a large marine terminal operated by the Commission of Public Docks, Terminal No. 4 (App. 247). BN and UP had rendered service to that facility since 1921 (App. 381). Their service, handled by UP under contract, was applauded by Witness Mowat representing the Commission; he said that the UP had "done a yeoman job, often going far out of their way to help us when the need arose." (App. 247).

It was in the light of the record recitation of the historical interest of the BN and UP in the development of the entire North Portland area, including Terminal No. 4, the industries reached by Peninsula and, indeed, Rivergate, that the Commission concluded that to accord Milwaukee and SP joint and equal ownership of Peninsula and related trackage rights "would constitute a new operation and an invasion of the joint applicant's territory" (App. 30).[27]

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[27] Appellants attempt to take out of context and elevate beyond all due proportion the Commission's observation that were the entire Portland territory treated as a single industrial area, this would provide "grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads." (App. 30). Obviously such efforts would remain within the control of the Commission, which would have to approve or disapprove whatever applications might be filed. But the rationale under-

Since the grant of the Milwaukee's and SP's applications would not result in demonstrable service improvements and, on the contrary, would operate to the disadvantage of BN and UP, which developed this area, the Commission concluded on balance that their applications for inclusion should be denied. That there is a rational basis for the conclusion of the Commission can scarcely be doubted.

C. No Need For Affording Milwaukee And SP Direct Entry Into The Peninsula Terminal Facilities Was Demonstrated.

Alternative to their bid for inclusion under section 5(2) of the Interstate Commerce Act, Milwaukee and SP seek the right to operate to and from Peninsula, on the theory that this is no more than affording them direct access to terminal facilities within the meaning of section 3(5) of the Interstate Commerce Act, 49 U.S.C. 3(5). As we have previously indicated, North Portland heretofore had not been served by Milwaukee and SP, and, accordingly, as the Commission reasoned (App. 34), they had no right of access to the North Portland terminal facilities of BN and UP.

However, Milwaukee and SP misconceive the purport of section 3(5) in suggesting that they do not

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lying such applications would be indistinguishable from that advanced here, and the Commission's concern for the "problems and litigation" attendant upon such applications, with consequent "disrupt[ion] of growth and development of the area" (App. 30), is plainly not unreasonable. This affords an additional reason for the weight given to the historical presence of BN and UP in the Penninsula-Rivergate area.

have the use of terminal facilities in the absence of obtaining the right physically to operate their power equipment upon such tracks. As we have sought to develop fully at the outset of our argument, it is axiomatic in railroading that effective service can be rendered through reciprocal switching no less than through direct service. That Milwaukee and SP can reach Peninsula and the industries beyond through the switching services offered them by BN and UP is peradventure clear. At best Milwaukee professes some concern about the charge to be assessed it for this service; SP, on the other hand, maintains that its operation of through trains somehow will avoid the congestion and resultant delays that UP's services have encountered.

Section 3(5) and the opportunity it affords to a railroad to obtain access to the terminal facility of another railroad heretofore has been satisfied by opening such terminal facilities by requiring switching arrangements in lieu of permitting physical operations. *Port Arthur Chambers of Commerce* v. *T. & F.S. Ry. Co.*, 136 I.C.C. 597 (1928), 73 I.C.C. 361, 364 (1922); *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 107 I.C.C. 208, 216 (1926), 69 I.C.C. 489 (1922). Under section 3(5) the Commission is empowered to order one carrier to perform terminal switching services for another. *Chicago & N.W. Ry. Co.* v. *Ann Arbor R. Co.*, 263 I.C.C. 287, 295-296 (1945).

Insofar as physical operation of power equipment is concerned, the Commission properly noted that the Peninsula-Rivergate area has historically been the

territory of BN and UP (App. 34), so that SP has no existing right to serve that territory with its own power. In this circumstance, SP would not be entitled to construct terminal facilities of its own to serve the area, and there was thus "no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests." (App. 34). Since the requested grant of trackage rights would not serve the purpose of "avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory" (App. 34)—one of the basic purposes for which Section 3(5) was enacted—and since there was no need by the shipping public that SP be afforded direct access, with its own power, to Peninsula, the Commission properly found "no ground for authorizing the requested common use". (App. 34).

Finally, we note that before the Commission can order the use by one carrier of the terminal facilities of another, it must find that "such use would be in the public interest, would be practicable, and would not substantially impair the ability of the carrier owning or entitled to the enjoyment of the facilities to handle its own business." *Jamestown, N.Y., C. of C.* v. *Jamestown, W. & N.W. R. Co.*, 195 I.C.C. 289, 292 (1933). See also, *Southern Pac. Co.* v. *A., T. & S.F. Ry. Co.*, 188 I.C.C. 557, 559 (1932). Although the Commission stated that it "need not reach the questions of whether common use of the facilities involved would be practicable or would sub-

stantially impair the ability of Peninsula and UP to handle their own business" (App. 34), the Commission's discussion in its report leaves no doubt that it was mindful of the adverse effect of the proposed Milwaukee and SP operations upon BN and UP without any real benefits accruing to their shippers or the public generally (App. 31-33). Under the circumstances, the Commission could reasonably conclude, as it did, that the section 3(5) relief sought by the Milwaukee and SP had not been shown to be necessary.

D. The Commission Gave Appropriate Consideration To The Competitive Effects Of The Transaction.

In urging that the Commission failed to give appropriate consideration to the competitive consequences of its approval of the control of Peninsula by BN and UP, without the inclusion of Milwaukee and SP, the Department is simply raising again the arguments consistently rejected by this Court in cases extending from *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) to *Northern Lines Merger Cases, supra.* Only last Term in *Northern Lines*, this Court reiterated that the promotion of competition, though a consideration, is only one factor in a Section 5 proceeding (396 U.S. at 513-514). And it is equally well settled that the task of balancing the competitive consequences of a transaction against the various other factors is a matter for the judgment and discretion of the Commission. *McLean Trucking Co.* v. *United States, supra.* This is particularly true where, as here, rival applicants seek

to control another railroad. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 187-189 (1959).

Here the Commission concluded that any advantage of four-way control of Peninsula would be outweighed by the adverse effect upon BN and UP—the carriers that have historically served the area—and the shippers dependent upon them for service. This, as the Commission found, "would be directly contrary to . . , the national transportation policy, to foster sound economic conditions in the transportation industry." (App. 33).

Contrary to the Department's assertions, the mere fact that BN and UP are financially strong carriers does not, *ipso facto*, justify the inclusion of two additional carriers in a transaction involving territory historically served by BN and UP. Application of the concept of territorial protection has never been limited to the protection of financially weak carriers providing adequate service. *Cf., e.g., Braswell Freight Lines, Inc.—Purchase—Shayler*, 101 M.C.C. 1, 17, sustained in *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98, 102-03 (W.D. Tex. 1967), *aff'd per curiam*, 389 U.S. 569, *reh. den'd.*, 390 U.S. 975; *Motor Common Carriers of Property —Routes and Service*, 88 M.C.C. 415, 424-25.

In sum, the Commission fulfilled its duty to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed" control (*McLean Trucking Co.* v. *United States, supra*, 321 U.S. at 87). Its conclusion that the transaction did not require the inclusion of Mil-

waukee and SP was a judgment well within its discretion.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, is as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), provides as follows:

> All carriers subject to the provisions of this part shall, according to their respective powers,

afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 3(5) of the Act, 49 U.S.C. 3(5), provides as follows:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the

use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 5(2) of the Act, 49 U.S.C. 5(2) provides as follows in pertinent part:

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of

another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed

transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding of such inclusion is consistent with the public interest.

* * * * *

Section 5(9) of the Act, 49 U.S.C. 5(9), provides as follows:

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

* * * * *

Section 5(11) of the Act, 49 U.S.C. 5(11), provides as follows:

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or fran-

chises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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In The

Supreme Court of the United States

OCTOBER TERM 1970

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

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No. 903

In The

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PORT OF PORTLAND, et al.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

APPELLEES' STATEMENT

The purpose of the statement of appellees Union Pacific Railroad Company (UP) and Spokane, Portland and Seattle Railway Company (SP&S)[1] is to supplement and, where in conflict, modify or correct the statements of appellants.

[1]Since the commencement of this case the Great Northern Railway Company (GN) and Northern Pacific Railway Company (NP), parents of SP&S have merged into Burlington Northern Inc. (Burlington Northern). However, when dealing with track rights, car interchange and other railroad operations, we will often speak of the predecessor lines.

1. Peninsula Terminal Company

Additional history should put the case in better focus. Peninsula is a small terminal railroad located north of Portland, Multnomah County, Oregon, with 3.79 miles of main, side and interchange track from which it currently serves 14 industries.

The attached Portland area map is a summary of information contained in Exhibit 58 and will aid in orienting the location of various geographic points and rail facilities in the Portland area.

Peninsula owns 13.17 acres of land worth $107,000 and other assets valued at $184,210. Peninsula's trackage connects with the SP&S and UP main lines through a yard designated "North Portland." Peninsula's trackage extends easterly approximately one-half mile from the North Portland Interchange Yard. Its main line track cuts through and curves beneath the fill of the SP&S main line and from there extends in a westerly direction slightly over one-half mile from the North Portland Interchange Yard. This western extremity of Peninsula's main line connects with an industry spur track serving the Crown Zellerbach Company (Crown) pole yard, located within the Rivergate Industrial District (Rivergate) of the Port of Portland (Port).

All outstanding capital stock of Peninsula is now owned by the United Stockyards Corporation (United). At the time United acquired the stock of Peninsula, it needed Peninsula's service as a terminal railroad for the purpose of serving its public stockyards at North Portland. As the Portland public stockyard business has

declined, the need for retaining ownership in Peninsula has become less pronounced.

UP and SP&S connect directly at North Portland where they interchange traffic and formerly served local industries. Their service in the area dates back to 1908. Initially, each carrier performed its own switching in overlapping and duplicating service. In 1915, this was alternated at two-year intervals.

Peninsula was organized in 1918 and thereafter constructed trackage to furnish switching service to the North Portland industrial district. Switching operations were carried on jointly by SP&S and UP until 1930 when Peninsula, without objection from its lessees, obtained Commission approval for operation of its trackage as a terminal railroad. See *Peninsula Terminal Company Operation*, 166 ICC 597 (1930). Acquisition of control of Peninsula by United was approved by the Commission in *Stockyards Railroad Company et al. Control*, 254 ICC 207 (1943).

Since 1912, SP&S, its parent lines, and UP have maintained a joint agency located in the same building with Peninsula's office for the handling of business for the SP&S, NP, GN and UP. These four trunk lines also maintain a yard office in the North Portland Yard. Both offices facilitate the interchange of cars between the four trunk line carriers and between each such carrier and Peninsula. All joint expenses are prorated on a car-count basis.

Attached as a second map is a drawing of the North Portland-Peninsula area track layout based on Exhibit

NSW-1 attached to Exhibit 26 (App 262). For many years this interchange yard has been and now is used by SP&S, NP and GN on the one hand, and UP on the other for interchange of traffic, and also by all four of these lines for interchange with Peninsula Terminal. These tracks provide a direct physical connection between the SP&S-NP-owned main line, or the UP-owned main line on the one hand and fully owned trackage of Peninsula on the other. Portions of this trackage were constructed as early as 1908 and the present layout in general has existed since 1931.

At the time of the application United was in the process of withdrawing from its rail operations (App 283). Thus, on several occasions consideration was given to the acquisition of Peninsula by UP or SP&S. One such occasion occurred in 1963 when United indicated to SP&S that it was disinterested in its railroad operations and proffered a recent appraisal of Peninsula properties as a proposed basis for sale. These negotiations did not produce an agreement. Again in 1966 United affirmed its willingness to sell (App 264) and the negotiations were opened between principals of SP&S and United only. However, when informed of such negotiations, UP decided to participate.

With this history and relationship SP&S and UP are the logical purchasers of Peninsula.

2. Rail Service to Rivergate and Peninsula

The UP and SP&S-NP are the only trunk line railroads physically connecting with Peninsula at the North Portland interchange tracks. At the time of the hearing

the cars of the GN and NP were interchanged with UP or Peninsula at North Portland although they were physically moved by SP&S from Vancouver, Washington (App 390).

SP reaches Rivergate by connection (1) with UP at East Portland (Ex 1, p 6-1, App 212), and (2) with the SP&S via the Depot Yard of the Portland Terminal Railroad Company (Portland Terminal) (App 502-3) on the west side of the Willamette River. At the time of hearing, Milwaukee service was available as a connecting line (Ex 28, p 3, App 280). Now that Milwaukee serves Portland directly, it can reach Peninsula through a number of options including a switching interchange with SP&S at East St. Johns, less than a mile away (App 391).

Rail service to Rivergate through the southwest gateway is furnished by SP&S-UP for themselves and SP and Milwaukee as connecting lines, with the UP performing the actual switching service. An agreement effective January 22, 1960 and executed May 26, 1967 (App 303), between the OWR&N-UP and SP&S provides for the service and reflects a letter commitment by the two railroads with the Port dated January 19, 1960 (App 295), as supplemented by a further letter of commitment dated May 25, 1960 (App 298).

The route for furnishing rail service to North Rivergate is yet to be determined. All public agencies involved assumed that Peninsula would operate into North Rivergate, although the Port when given the opportunity,

would not say which route it preferred (App 245).[2] As found by the Commission, service to North Rivergate could be "based upon the possible construction on the eastern side of Rivergate of an SP&S main line extension or an extension of Peninsula's track into the area" (App 15). Under Article XIV of the May 26, 1967 agreement and the provisions of the May 25, 1960 letter, if at any time Rivergate is served by trackage springing from the main line of the SP&S, the SP&S will admit the UP to joint ownership and use thereof on terms substantially the same as extended to the SP&S at the southwest gateway.

Six industries occupy 265 acres, or slightly less than one-tenth of the Rivergate area (App 15) and the balance is under development.

At the time of hearing the rail carriers performing line-haul service in connection with Peninsula traffic absorbed switching charges, with minor exceptions for some SP local noncompetitive traffic (App 254; 285; 512-514). The railroads serving the North Portland territory have now established a single basis of switching charges at all common points within the states of Northern Idaho, Oregon and Washington on competitive and noncompetitive carload traffic, and switching charges are absorbed by the line-haul carriers, with two exceptions:

1. A minimum line-haul revenue of $100 per car after absorption must be maintained, and

---

[2]The Port's consultant in a $400,000 planning study made in September 1967 recommended a route connecting with the SP&S main line (App 282).

2. Switching charges will not be absorbed where tariff rate items specifically exclude such absorptions.[3]

The second exception reserves to the carriers the right to publish low rates to meet other competitive modes of transportation (App 286).

Milwaukee began absorbing the Portland switch charges on the same basis at points it considered off line on March 22, 1971,[4] the date Milwaukee extended service to Portland. In practice, reciprocal switching means that one line-haul carrier will act as a switching carrier in placing cars at industries via its own trackage as an incident of the line-haul movement of those cars by another carrier whose trackage does not extend to the served territory.

The carriers reciprocate in the roles as switching and line-haul carriers in accordance with the flow of traffic to and from industries on the respective trackage. In theory, the carriers mutually exchange their switching services in these terminal areas with the effect of extending the lines of each carrier to the other industries—even on traffic for which they may be directly competitive as line-haul carriers. See *Switching Charges and*

[3]These switch charge absorptions were published effective December 5, 1969 in the following Rail Tariffs:
Chicago, M.St.P.&P.R. Co.—Tariff No. 11606, I.C.C. No. B-8197.
Great Northern Ry.—Tariff No. 1216-L, I.C.C. No. A-9360.
Northern Pacific Ry.—Tariff No. 66-Y, I.C.C. No. 9999.
Oregon Electric Ry.—Tariff No. 64-L, I.C.C. No. F-174.
Portland Traction Co.—Tariff No. 1-B, I.C.C. No. 36.
Southern Pacific Co.—Tariff No. 230-K, I.C.C. No. 4960.
Spokane, Portland and Seattle Ry.—Tariff No. 434-R, I.C.C. No. 774. Tariff No. 1072-K, I.C.C. No. 770.
Union Pacific R. Co.—Tariff No. 9000-G, I.C.C. No. 5651.

[4]Chicago, M.St.P.&P.R. Co. Tariff No. 11606-ICC B-8197, Supplement 14, March 22, 1971.

Absorption Thereof at Shreveport, Louisiana, 339 ICC 65, 70 (February 2, 1971.)

Switching services offered by the various Portland carriers are described in detail on Exhibits 57 and 58 (App 351-352 and 355-356). The attached Portland area map was taken from the Oregon Public Utility Commissioner's (OPUC) Exhibit 58 and depicts the various areas now reciprocally switched by Portland carriers at no cost to the public except when the two limitations noted previously come into play.

As Exhibits 57 and 58 show, both SP&S and UP hold themselves out to switch traffic reciprocally to industries in the North Portland and Rivergate switching districts. Thus, Portland industries, including Rivergate and all other points in the North Pacific Coast territory are now on a competitive basis, and, with the exceptions noted, all switching charges are absorbed and all industries, including those in Rivergate, now have the single-line service of all railroads serving Portland, Oregon.

3. The Examiner's Basic Errors

The examiner made two fundamental errors upon which he structured his ultimate findings and proposed order.

(a) His Double Standard.

In making his findings, on virtually every issue in this case, the Examiner discussed public interest on the basis of an assumed Rivergate development. However, when considering congestion, impairment and interference in the operations of applicants he looked to

conditions as they exist today. In adopting this approach, the Examiner accepted general hypothetical testimony of the Port's supporting witnesses concerning their plans for Rivergate without considering the detailed and substantial testimony showing the adverse effect SP and Milwaukee use would have on the present operation of North Portland interchange and intervening trackage and the costly and dangerous congestion such use would create.

(b) His One Terminal Theory.

On pages 36 and 37 of the Examiner's Report, he concluded that the "factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity" (App 116). This was based in part on his conclusion that the present and future traffic patterns in the entire Portland area must be considered. The record has never supported such a conclusion since evidence of present and future traffic has been limited solely to what is now handled by Peninsula and the projections offered by the Port's witnesses. There was no evidence of traffic levels or traffic patterns from any of the other many points within the greater Portland area.

The one transportation terminal entity theory was and is factually inaccurate, yet it was basic to the Examiner's conclusion that the Milwaukee and SP should be included in the ownership of Peninsula and should be given trackage rights to connect directly with Peninsula.

This is the position in which the Commission found itself when the case reached it on exceptions. Its re-

versal was based largely on the two errors just noted. We will show that the Commission has proceeded in accordance with law, its findings and conclusions accord with statutory standards and are supported by substantial evidence. Its order should be upheld. See *Northern Lines Merger Cases*, 396 US 491, 503 (1970).

QUESTIONS PRESENTED

Question 2 in the Brief of Appellants was not raised in the Jurisdictional Statement and under Rule 40(1)-(d), the arguments in support of it should be disregarded. Appellants made no argument of issues under Question 2 in the Jurisdictional Statement and they should not now be allowed to "smuggle in" additional questions. See *Irvine v. California*, 347 US 128, 129 (1954).

The argument contained on pages 30 and 31 of Brief of Appellants, all of the Supplemental Brief of appellant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and pages 25 through 32 of the Brief of the United States should therefore be stricken from the record.

Since the United States is cast in a role supportive of appellants[5] it cannot unilaterally attack the decision below with new grounds not raised by appellants. Therefore, any questions raised by the United States outside of those raised by appellants in the Jurisdictional Statement should likewise be disregarded.

---

[5]Rule 10(4) provides in part: ". . . but appellees who support the position of the appellant shall meet the time schedule for filing papers which is provided for the appellants, except that any response by such appellee to a jurisdictional statement shall be filed as promptly as possible after the receipt of the jurisdictional statement."

ARGUMENT

Summary

1. Appellants seek to have this court reweigh the evidence behind the Commission's Section 5(2) public interest determinations under the guise that certain erroneous legal tests were applied in approving control of Peninsula subject only to standard traffic, operating and employee protective conditions. We contend the Commission gave full consideration to all facets of the appellants' case and decided it by applying a proper interpretation of the law to the evidence at hand.

A. The Hearing Examiner's recommendation was based on inconsistent and unsupported theories, one where he employed a double standard as previously explained, and another based on a terminal entity completely at odds with the facts. The Commission's reversal corrected these two errors and as a reading of the report showed, the Commission was completely aware of Rivergate's location, potential and needs. Appellants' proof centered on the present and future transportation requirements of Rivergate, though two of the three shippers supporting inclusion were in a section of Rivergate which could not be reached by Peninsula. The evidence as a whole did not support any railroad benefit or public need which could not be fulfilled by the granting of the SP&S-UP application. The passage of ownership of rail property from the noncarrier United to the lines serving the property coincides with a long and rational line of prior Commission decisions, and it was conditioned on the maintenance of Peninsula as a separate nondiscriminatory entity. Connecting carriers

and the public will gain by having experienced railroads take over the management of Peninsula, and these carriers stand committed to run Peninsula without preference, prejudice or discrimination.

B. The Commission's correction of the Examiner's erroneous "one transportation terminal entity" conclusion merely brought the decision in line with the truth. The effect was to advise appellants that the granting of their wishes could not be based on a false premise. The concept of a single, unified terminal, whose boundaries are undefined, simply could not be built solely on the presence of SP and Milwaukee in the general area. As the attached Portland print shows, definite areas of service have developed over the years. If presence in any part of that area can be used to reach Peninsula, this will promote efforts to retaliate by seeking to extend into adequately served territories. The rejection of this false theory was not, however, the crux of the Commission's decision. Later, in its report, the Commission clearly shows that it based its denial of inclusion not on the lack of one transportation terminal entity, but rather on the lack of public interest, giving full consideration to the classic standards set forth in *New York Central Securities Corp v. United States*, 287 US 12, 25 (1933).

C. The Commission's finding that SP's and Milwaukee's proposed connection with Peninsula amounts to an invasion of territory is factually sound. This finding is appropriate and completely applicable in this proceeding since both Milwaukee and SP seek to extend their service into an area already adequately served.

Whether this is done through construction of track or extension of operations via trackage rights or use of terminals the invasion of territory concept is the same. In this proceeding, substantial evidence supports the finding that SP&S and UP have in the past and can in the future render adequate, efficient and economical service to the area involved. Under these circumstances their territory must be protected against attempts to "shotgun" into areas already adequately served especially when invasion would impair the ability of SP&S and UP to handle their own business.

2. BN is willing to permit Milwaukee use of the North Portland Yard to afford a direct connection with Peninsula but continues to oppose Milwaukee's equal ownership of Peninsula stock. Union Pacific is willing to grant such use provided (a) BN handles Milwaukee traffic as its agent, and (b) Milwaukee relinquishes its request for inclusion in ownership of Peninsula. The balance of the argument on Milwaukee's position is pertinent only if Milwaukee refuses this proposal.

3. The Commission appropriately adopted a single public interest criterion in refusing to accept Milwaukee's theory of the case. Nothing expected or given Milwaukee in the *Northern Lines* case was taken from it. Nothing in the decision supports the contention that Milwaukee is entitled to inclusion or to special treatment under Condition No. 24. Milwaukee service through North Portland to Peninsula is fully available though physically handled by applicants to and from North Portland. Milwaukee rates, routes, cars, solicitation efforts and all other single-line services are avail-

able now without the congestion additional Milwaukee movements at North Portland would cause. Public interest was properly decided and the specific contentions raised by Milwaukee and the United States form no basis for reversal.

4. Section 5(11) arguments of appellants show no defect in the Commission's handling of its responsibility as it pertains to this case. Clearly, the competitive effects are at a minimum since the decision effected no change in rail operations. The Commission thoroughly considered all the various proposals and supporting evidence before choosing the one best fulfilling the overall transportation policy. Findings in this regard meet the requirements of Section 5(11), have ample support in the record, and appellants' argument to the contrary is unconvincing.

5. The interpretation of Section 3(5) in this case coincides with the intent of Congress expressed in the Transportation Act, 1920, and the Commission's implementation of it in subsequent decisions. No proposal encompassing the avoidance of unnecessary expense from duplicating services was present here. The Commission correctly found SP is not entitled to serve Peninsula or Rivergate directly. These points, served through SP&S and UP, are six miles from SP's nearest track. Appellants raise no real protest to this basic finding which leads to the inevitable conclusion that there are no grounds for authorizing the requested common use.

1. The Commission correctly applied the public interest criteria of applicable statutes as supported by the evidence in this proceeding.

In cases such as this where a noncarrier is no longer interested in owning rail property, the Commission has consistently found that it is in the public interest for that property to pass to the ownership of lines serving it. See *S. & A. Ry. Co. Control*, 282 ICC 390 (1951); *Detroit T. & I. R. Co. Control*, 275 ICC 455 (1950); *Illinois Northern Ry.*, 275 ICC 803 (1949); and *Niagara Junction Ry. Co. Control*, 267 ICC 649 (1947).

The Commission's approval of the title proceeding in Finance Docket No. 24679 followed this line of cases. Appellants have not taken issue with the following basic public interest finding:

> "The record establishes that the purchase of Peninsula by SP&S and UP will be in the public interest. The joint applicants now connect with Peninsula and the present service to its industries will be unaffected by the substitution of joint applicant's control for that of United. Furthermore, it will be in the public interest for control of Peninsula to pass from the noncarrier, which no longer desires it, to carrier auspices and on this record the most logical owners would be Peninsula's connecting carriers . . ." (App 25)

(a) The Commission correctly determined public interest after giving full consideration to the effect all proposals would have on the public as a whole.

Appellants argue that the Commission took a narrow view of Peninsula alone in resolving the public interest factor, which appellants say is centered around "the great public interest in the development of Rivergate as

a key project in the present and future commercial and industrial development of Portland, the State of Oregon, and in truth the Pacific Northwest" (App Brief 13).

The Examiner (App 116) made a superficial analysis of "the involved Portland area, including land and transportation facilities of the public, of all types of carriers there, and of the shipping industries." He then found directly contrary to any evidence of record that:

> "The factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity." (App 116)

On exceptions appellees pointed out that the evidence in the case was limited to the past and present use of North Portland and Peninsula as well as the projections of future growth within the Rivergate area. The Examiner's failure to decide the case within these parameters caused the Commission to make the following finding:

> "... Therefore, we do not agree with his conclusion in this regard and for that reason we consider Peninsula, rather than the entire Portland area, to be the focus of our attention in resolving the public interest factor." (App 30)

The Commission's reference to Peninsula obviously meant the Peninsula-Rivergate area and the need of Rivergate for rail service now and in the future. The report read as a whole clearly supports such a full-blown view of public interest.

The Commission's report first noted that the matter was before it on exceptions to the Examiner's Report

and Recommended Order, reviewing the various applications and petitions it had to decide (App 12-13). The Commission then adopted the Examiner's detailed description of rail parties, their local operations and their positions in the case (App 14).

The Commission next described Peninsula and the interest of the Port, SP and Milwaukee in the purchase of Peninsula's control by SP&S and UP, noted the physical characteristics of the property and reviewed in detail the industrial development on the west or Willamette River side of Rivergate. The position and extent of Crown's pole yard was also described as was the location of the thirteen industries served from Peninsula's main line. The existing access route from the south and the recommendations for a northern route into Rivergate from the SP&S main line extension or an extension of Peninsula's trackage into the area was also noted (App 15).

Nor was this all the consideration given to evidence of Rivergate. Under the heading, *The Proposed Transactions* (App 17-21), the Commission made extensive findings on the positions of the various parties and adopted verbatim five pages of the Examiner's Report instead of repeating them.

The Examiner's review of evidence by witnesses of Crown, Oregon Steel Mills (Oregon Steel), and Collier Carbon and Chemical Company (Collier), was also adopted verbatim by reference (App 61-65). Traffic estimates for all of Rivergate became part of the record in the same way (App 57-59).

About all of the Examiner's Report which the Commission did not adopt were his Discussions and Conclusions and Ultimate Findings. Since appellants appear satisfied with the Examiner's analysis of the evidence, their argument that the Commission failed to consider fully the positions of the parties seems strikingly inconsistent.

A further thorough and independent review of the needs of shippers was made by the Commission, and the contentions of the public agencies on briefs and replies to exceptions were thoroughly considered prior to the Commission's concluding that shippers and public agencies "motivated by a desire for the service of as many railroads as possible into Rivergate." (App 33) This alone was not enough for inclusion of SP and Milwaukee in the proposed transaction.

Both on Brief and Joint Exceptions, UP and SP&S challenged the public agency evidence by questioning the reliability of the Port's traffic projections (R 35, p 47 and R 39, p 22). We noted that the projections were highly speculative since they turned basically on Witness Plowman's prediction that by the year 1990, western railroads would generate in ton miles twice the volume of 1966. How this would relate to Rivergate, much less Portland, was never established save by the bald assertions of one man. None of the 21 exhibits offered by the other Port witness was ever correlated into industrial development on which traffic projections could be based. This evidence itself could not be turned into reliable evidence of transportation needs.

Nonetheless, appellants contend that the unspecified needs of shippers who may locate in the future in Rivergate, and of the shipping and consuming public as a whole, should have dominated the Commission's consideration of its issues (App Brief 15). The simple answer is that it was considered along with all other evidence of record before the Commission reached its decision.

Whenever new service is instituted to take care of potential growth in an area already adequately served by other carriers, the Commission has followed the principle that a strong and urgent need for the proposed service must be demonstrated.

> "None of the reasons presented by the applicant in support of the application under the circumstances shown indicates a strong or urgent need for the proposed service. See *Utah Terminal Ry. Co. Application*, 72 ICC 89 (93), 79 ICC 187, and *Galesburg & G.E.R.J Co. Construction, supra* (477). In *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59, 21 NW(2) 5, cited by the applicant as supporting a contrary view the Wisconsin Supreme Court held:
>
> > " 'If there was a strong urgent need for the connection here sought then there was a necessity for it . . .' " *Northern Pacific Ry. Co. Construction*, 295 ICC 281, 295 (1956).

The Port's evidence regarding Rivergate simply did not rise to the level of a "strong and urgent need."

No evidence supports appellants' contention that granting of ownership and direct access to SP and Milwaukee will itself improve service. These carriers will accumulate cars for movements to North Portland for

interchange with Peninsula in much the way these cars are now accumulated by appellee rail carriers. This was demonstrated by the testimony of SP Traffic Manager E. C. Ordway (App 515-516).

Appellants scrupulously avoid discussion of how sorting, accumulating, inspection, repairs and other services could be conducted so as to actually improve operations. Since UP and SP&S will continue to handle their own traffic to and from Peninsula, if SP and Milwaukee were included, switching now performed by two lines would be carried out by four carriers, thus instituting a wasteful duplication of service with its attendant adverse effects which would tend to promote a poor rather than good service.

Car supply would plainly not improve by inclusion, as appellants assert, since rail cars are already furnished by SP to Peninsula and Rivergate industries (App 580). The Milwaukee anticipated it would do the same once it instituted service to Portland (App 529).

The so-called rate advantages of single-line service came into play by the assertion of SP that it was unwilling to extend all rates to Peninsula industries unless it directly connects with that line. Right now, SP could remove any rate disadvantage if its management wanted to, subject only to the requirement that the remaining rate is compensatory (App 513, 521). The application of Milwaukee rates to North Portland is also strictly within its management's prerogative. No appellant has challenged this, and for good reason, because the so-called rate advantages simply do not depend upon the

inclusion of SP and Milwaukee in the ownership of Peninsula or in direct access to that line.

Appellants contend that supporting shipper evidence was treated by the Commission in a "somewhat slighting fashion" (App Brief 17) but they failed to give explicit examples of any unfair treatment whatsoever. Oregon Steel claimed a need for unit trains, yet invested $35 million in a section of Rivergate where unit trains cannot be handled via Peninsula. It selected Rivergate to take advantage of inbound water shipments of ore and to be near potential users of steel (App 63). The location of the steel mill had nothing to do with its Mount Shasta ore development (App 477) nor does the record establish that under four-railroad control the other three railroads would be willing for Peninsula to incur the expense of building rail facilities to implement a unit train, solely for the benefit of SP (App 32). The Commission's treatment of Oregon Steel's evidence is sound, and appellants' disagreement raises no substantial point for consideration.

Collier established a plant in the south part of Rivergate and sent a witness to support SP who could not even locate Peninsula in relation to Collier's plant (App 428-429). He had little notion of how Peninsula could be used by SP to serve Collier's plant; and the Commission's finding that Collier's support was based on the general supposition that the more rail service it had the better the service would be, is a complete and full analysis of Collier's testimony (App 33).

Appellants' so-called "unrefuted proof" (App Brief 17) of single-line benefits amounts only to a superficial recital of the usual maxims favoring single-line service contained in three paragraphs of five to six lines in the prepared statement of Crown's Assistant General Traffic Manager (App 302). Crown itself did not object to the Commission's treatment of its testimony when it filed its Petition for Reconsideration in this case (R 48). In that document Crown based its support on the hope of gaining a broader supply of an extremely scarce type of specialized equipment—drop end gondolas. The Commission, however, found no evidence supported this hope (App 32).

'Nor will the Commission's decision in any way inhibit the industrial growth of Rivergate. While SP's Manager of Industrial Development claimed his company would have no incentive for locating industries in Rivergate (App Brief 17, App 509-10), the witness for Collier refuted this statement.

When asked about aid rendered by SP in locating the Collier plant in Rivergate, Witness Sandell stated as follows:

> "Q. 'Was your plant located in its present position through efforts of the SP&S Railway, do you know?'
>
> "A. 'Yes, we have received assistance from the SP&S.'
>
> "Q. 'From the Union Pacific?'
>
> "A. 'Probably.'
>
> "Q. 'From the Southern Pacific?'

"A. 'Probably.'

"Q. 'Do you know, on those two probablies, do you know?"

"A. 'Yes, we have received assistance from all those railroads in locating plant sites for this particular project.'" (App 429)

SP Witness Linde admitted that SP had worked with several industries who are presently located in Rivergate (App 510). When an industry seeks a location in Portland, the Rivergate Industrial area becomes a natural topic of discussion. Witness Linde testified:

"And you did inform Mr. Sandell of the Collier Chemical plant . . . of the site at Rivergate."

"A. There is no industry I know of who would have to be informed about the presence of the Rivergate Industrial. All of those with whom we have dealt in the Portland area are already aware of it and it always becomes a matter of discussion." (App 510)

Appellants further contend that the Commission refused to consider their evidence on industrial development or to consider the Port's evidence "relating to Rivergate's importance, its traffic potential, its transportation needs, its traffic development and other factors bearing on the issues." (App Brief 19) This is simply not true. As mentioned a moment ago, the salient parts of the Port's case were reviewed in the Commission's report (App 14 and 15) as well as through excerpts from the Examiner's opinion which dealt with the positions of the public interveners:

"*Interveners.* — The petitions and applications of Milwaukee and SP are supported by the Port, the Portland Commission of Public Docks, City of Portland and the Oregon Commission. *Positions of these*

interveners are set forth in excerpts from the hearing examiner's report appended hereto and need not be repeated here." (App 21) (emphasis added)

In making its ultimate findings on the merits of the petitions for inclusion, the Commission further found:

> "We have thoroughly considered the briefs and replies to exceptions filed by the public agencies participating in these proceedings. Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate." (App 33)

Thus we have demonstrated in this section that the Commission gave full consideration to the needs of the Peninsula-Rivergate area. The decision in this case is a proper interpretation of the evidence before the Commission, and there is no basis for asserting that either SP or Milwaukee must be included, since their inclusion would not improve service, increase car supply, be necessary for single-line rate applications, or be essential to enhance the growth of Rivergate.

(b) The Commission correctly concluded that adoption of the Hearing Examiner's treatment of the entire Portland area as "one terminal entity" would lead to more problems and litigation than the "divisive determinations" frowned on by the Examiner.

Appellants contend that the Examiner's erroneous "one transportation terminal entity" conclusion should have been followed and that the Commission was wrong in rejecting it (App Brief 21).

The Commission's findings involved under this argument read as follows:

> "The hearing examiner concluded that the entire Portland territory is an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity. He felt that 'divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area.' Therefore he bases his recommendations upon consideration of the involved area as a whole." (App 30)

The Commission then stated that mere presence in a general area does not give a railroad the right to serve all industries "anywhere within that undefined geographical area." (App 30) Based on the above, the Commission held as follows:

> "If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any and all other railroads. The resulting situation could well give rise to more problems and litigation and be more disruptive of growth and development of the area than the 'divisive determinations' frowned on by the hearing examiner." (App 30)

In their argument on this point, appellants make no attempt to show that any evidence supported the Examiner's proposed treatment of Portland as a single transportation terminal entity. There is in fact no support for the Examiner's conclusion, and as the attached map shows, Portland is divided into a number of switching districts. Each Portland carrier has its own recognized territory. The Commission simply conformed its conclusions to the facts of record in rejecting the single transportation terminal entity theory.

Appellants attempt to argue that only under Section 5(2) proceedings can a carrier seek to serve stations and industries on lines of another carrier (App Brief 22). Here, both SP and Milwaukee seek to reach North Portland and connect with Peninsula under Section 3 (5). If Portland were denominated as a single terminal entity, and upon this basis Milwaukee and SP were granted rights to connect with Peninsula, an open season would be declared on all other terminals on lines of other carriers whether within or without the switching districts previously noted.

Granting of Section 3(5) applications are, in the main, dependent upon the existence of a definite union terminal operation within a defined terminal area as opposed to extending service into territory switched exclusively by other railroads. See *Chicago & Alton R.R. Co. v. T., P. & W.*, 146 ICC 171, 178-9 (1928), and *Use by Erie of Niagara Junction Ry. Co. Terminals*, 269 ICC 493, 498-9 (1947). Also, this could lead to attempts to reach out to industries already served directly by a competitor under the guise of an exempt Section 1(22) switch or industry track connection, *Nashville, C. & St. L. Ry. Construction*, 295 ICC 363 (1956), which was plainly in the Commission's thoughts when it made the involved finding (App 30).

This would not be limited to Portland but could affect the entire country. The requirement of the Interstate Commerce Act, that those carriers serving areas efficiently, economically and adequately be allowed to continue undisturbed, would be nullified; and indeed

many more problems and litigation would ensue than those "frowned upon by the Examiner" (App 30).

Appellants contend adoption of their views affords no opportunity for "shotgun terminal expansion" (Brief 22). They claim that neither SP nor Milwaukee have ever expressed a desire to serve points other than North Portland for a connection with Peninsula. This is inaccurate.

The Examiner noted that SP's application:

> "... in Finance Docket No. 24891 specifies no particular type of trackage rights sought. In the best public interest any authorization of proposed trackage rights should permit *full user rights*, with the attending assumption by the recipient thereof of the entire use and responsibility and the payment of compensation therefor on a numerical basis." (App 124-125) (emphasis added)

SP stoutly defended the Examiner's conclusion, which had the effect of opening all UP served industries between East Portland and North Portland (a distance of 6 miles) to SP's unfettered invasion. In SP's Reply to Exceptions (R 41, p 38), SP stated it sought common use of UP terminal facilities—not bridge trackage rights. SP unequivocally argued:

> "Union Pacific has been on full notice throughout these proceedings that the issue of full trackage rights over the involved Union Pacific accessorial tracks is at issue in this case, and the Examiner's grant of such rights cannot possibly come as an unexpected surprise to applicants." (R 41, p 38)

In this very proceeding SP has sought rights to serve all industries in the heart of UP's main Portland yard, and its current retreat from that position (see App Brief

in Opposition to Motion to Affirm, pp 4-5) cannot change this fact.

By the same token Milwaukee's counsel contended that they had not put any limitations on the use they intend to make of North Portland interchange yard (Tr 234), and the Milwaukee's management was authorized to file applications covering extensions and trackage rights into Portland including operating rights upon all terminal facilities in the Portland area. Whether or not this included Albina, Brooklyn, Guilds Lake and Barnes or other terminal facilities in Portland, Milwaukee's witness was unable to say (App 522-523).

If SP and Milwaukee are given rights to reach North Portland and connect with Peninsula based on a false "one transportation terminal entity" theory, what is to stop them from asking next to deliver their own cars to the Kenton industries, through Barnes Yard to Terminal 4, or to South Rivergate, or even for SP to cross the Columbia River to spot its own cars at industries in Vancouver? In other words, why shouldn't each carrier handle all its own cars to the industries on lines of all other carriers or build its own tracks to reach all industries wherever two or more lines serve a common point? The obvious answer is that impossible operating conditions would cause wasteful duplication, divided responsibilities, delays, damage to goods and dangerous working conditions which are avoided when standard switching interchanges take place.

In deciding the case as it did, the Commission followed the accepted method of terminal service as ex-

pressed by Union Pacific Witness G. H. Baker, when he stated:

> "Under ideal multi-line operations, when switching industries and interchanging traffic, a single carrier is designated as the switching line with as few delivering carriers as possible. This way the general public receives the best service and a minimum of disruption to its plant and the railroads involved are put to least expense." (App 276)

Acceptance of the Examiner's one transportation terminal entity could destroy this normal method of terminal operation, a fact which the Commission was quick to recognize.

(c) The Commission correctly concluded that a direct connection by SP and Milwaukee with Peninsula would constitute a new operation and thus an invasion of joint applicants' territory; and the Commission correctly concluded that the evidence failed to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently and economically.

Appellants find fault with the following Commission findings:

> ". . . since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory." (App 30)

Appellants claim by this finding that the Commission has improperly given this territory exclusively to joint applicants (App Brief 24-25). A reading of the several cases appellants cite (App Brief 25) in support of this contention will show that a present or prospec-

tive inadequacy of service must be established before a new operation may be certificated. The soundness of such decisions cannot be questioned here. Since appellant railroads plainly do not connect with Peninsula and thus directly serve the area, an inadequacy which gives rise to a need for more carriers must be proved by those seeking to extend new service. This clearly applies whether extension is under a certificate or as a condition to a Section 5(2) application.

In *Chesapeake & Ohio Ry. Co. Construction*, 267 ICC 665, 667 (1947), the Commission agreed a railroad in a given territory has a *prima facie* right to serve the area and direct service of another carrier will not be authorized without strong proof of further public need.

The Commission has found no such need in this proceeding and in fact has stated that the evidence of appellants, including all the evidence covering the Rivergate development, shows at best an ill-considered desire for as many railroads as possible in Rivergate. No evidence was offered to establish how this desire for service could be effected within the framework of a national transportation policy which is designed to foster sound economic conditions in the transportation industry. On this point the Commission found:

> ". . . Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate. However, this objective, if achieved at the expense of the joint applicants as proposed in the instant proceedings, would be directly contrary to the precept of the Congress,

> embodied in its national transportation policy, to foster sound economic conditions in the transportation industry." (App 33)

The United States (USA Brief 19) cites "The Calumet Harbor" case, *Illinois Central R. Co. Construction & Trackage*, 307 ICC 493 (1959), and two other cases urging proof of present and future convenience and necsity in those cases can be substituted for appellants' failure to establish a public need here. In each case cited, construction of a direct connection to a developed port or industrial facility was permitted to fill a service void. Here, carriers seek not to construct their own track but to unilaterally use SP&S and UP trackage to interchange traffic at North Portland with Peninsula which someday may be used to switch within the yet undeveloped northern section of Rivergate. Furthermore, the Commission here found that public agency evidence failed to show that applicant lines cannot "handle present and future traffic in the Peninsula territory adequately, efficiently and economically" (App 33) and thus the cases are clearly not parallel.

No pat answer is found in *Consolidation of Railroads*, 159 ICC 522 (1929) (USA Brief 19), where the Commission also stated on page 523:

> ". . . In the face of such a great variety of circumstances and conditions, it is impractical to prescribe in advance a universal rule for terminal rail unification and operation. Each terminal and the properties serving it must be studied in light of its particular facts and a practical solution worked out with due regard to the property and other rights of all owners and users."

Here, it is important to note inclusion under Section 5(2) has usually been limited to protection of weak rail lines, *Pennsylvania R. Co.—Merger—NYC*, 327 ICC 475, 532 (1966), 328 ICC 304, 326 (1966), *B. & O. R. Co. v. United States*, 386 US 372 (1966), and *Penn Central Merger* cases, 389 US 486 (1968), and has been denied when those seeking it would suffer no traffic loss and inclusion would reduce incentive and actually frustrate management. See *Toledo, Peoria & Western R. Co.* Control, 295 ICC 523 (1957), sustained *per curiam sub nom Minneapolis & St. Louis R. Co. v. U.S.*, 165 F Supp 893 (4th Div. Minn. 1958) and affirmed 361 US 173 (1959). SP and Milwaukee offered no proof of need for protection, and four-way management of Peninsula would obviously reduce its effectiveness (App 19, 276, 418, 419).

The rule of transportation law which appellants contend has been misapplied was stated by the Commission in its report as follows:

> "... In the past, the Commission has usually held that sound economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded a right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic and is generally also followed in proceedings involving motor carriers. See *Minneapolis, St. Paul & S.S.M. R. Co. Acquisition*, 295 ICC 787, 802, and cases cited therein." (App 30-31)

The Commission later applied this principle when it found:

> ". . . In our opinion, and we so find, the evidence offered by the three shippers supporting SP's position, as well as the evidence offered by the petitioners themselves, fails to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically." (App 33)

Appellants base their claim of misapplication on what they say is a "profusion of evidence concerning a deplorably poor quality of service to and from Peninsula industries" (App Brief 27). A review of evidence on present and future service to Peninsula-Rivergate shows that such service is and will be adequate and that appellants' assertion to the contrary is incorrect.

Appellants' whole case on this point is founded upon the "30-hour average" which appellants contend is a "transit time" in interchanging traffic between SP-UP at Albina and UP-Peninsula at North Portland. The 30-hour average is not a transit time. It is the time required to perform all railroad functions in the interchange of Peninsula traffic and includes the yarding, sorting, inspecting, switching, accumulating and moving of cars in schedule service via Kenton to North Portland. It is in no way comparable to the SP theoretical "running time" for a direct round trip to North Portland, which includes none of the items just mentioned.

Cars coming to Albina are not pre-sorted, must be inspected and, if necessary, switched to repair tracks,

otherwise they are switched to designated tracks for outbound movement. Cars for Peninsula are placed in with Kenton traffic and may need reswitching to place them in the proper part of the transfer train (App 419-420). The UP-Kenton engine normally handles all North Portland traffic in two separate round trips daily on its "turn" through the Kenton industries because it is used to pick up and set out traffic interchanged at North Portland between the BN and UP. At the same time the Kenton engine interchanges the SP and UP traffic with Peninsula at North Portland. If there is a need for expedited service at North Portland, the Peninsula traffic is handled directly without taking the Kenton route (App 420-421).

Sixty-one percent of the traffic now interchanged at North Portland is between BN and UP and originates or terminates in the Kenton area of UP. The balance is line-haul to or from Peninsula via BN and UP as well as their connecting lines such as Milwaukee and SP (App 260). Accordingly, the method just noted affords a most economical service consistent with the present needs. It assures six scheduled stops daily at North Portland because of the numerous interchanges applicants make there (App 46).

All needs of the area can clearly be met by BN and UP and appellants' evidence offers no serious challenge. UP Assistant Superintendent R. B. Hardin testified that SP&S and UP can and will "furnish service as required" if Peninsula is used as a vehicle for service into Rivergate and that at the present service was meeting demands (App 574). The North Portland

Agent received only six or eight service complaints (App 364) on 7,600 to 8,600 cars handled through his station each year (App 260). Intervening shipper Crown, the only Peninsula shipper supporting SP and Milwaukee, had experienced no unusual delays at its pole yard located on Peninsula.

> "Q. 'Well, Mr. Krause, you mentioned being in competition. Have you made any inquiries as to the problems of your competitors in this area for large cars?'
>
> "A. 'No. I have not.'
>
> "Q. 'Would you feel that your delay is unusual as compared with other comparable industries requiring this type of car?'
>
> "A. 'I don't—I have no feeling about it because I have made no comparison.'
>
> "Q. 'Once the cars are there and loaded and they are loaded out, do you have any unusual delay in having those cars pulled from your industry?'
>
> "A. 'I haven't heard of any.' " (App 454).

Crown in fact has no basis for claiming deficiencies since it has no control over which railroad obtains the business. The routing of pole shipments is specified by the buyer and this also dictates the carrier from whom specialized equipment must be obtained (App 451-452).

SP's Witness Ordway claimed that he had received complaints concerning delays in service to North Portland as traffic manager for that railroad (TR 524). Yet, on cross-examination he could not state how many complaints he had received in the previous year, and he made no effort to contact officials of the SP&S and

UP in an effort to rectify any real or imagined service deficiencies (App 514). Neither UP General Manager G. H. Baker nor Witness Hardin received these or other complaints on service (App 398-399; 751).

The other shippers supporting SP, i.e., Oregon Steel and Collier are located in South Rivergate. Their plants were only under construction at the time of the hearing, and their testimony in no way could bear on the adequacy or efficiency of service between North Portland and East Portland because they would not use any such service.

Witness Mowatt, Deputy Sales & Service Manager for the Dock Commission, who appeared in support of a four-way ownership of Peninsula, offered as an exhibit a speech made at a conference called to discuss the implementation of the plan for absorption of reciprocal switching charges. Witness Mowatt had the following to say concerning the quality of service rendered by Union Pacific in South Rivergate and adjacent territories:

> "The physical switching within the Port's Rivergate Industrial District (South Rivergate), the Commission's Terminal No. 4, the Terminal 4 extension, the Port's Swan Island Industrial Park, and the Commission's Albina Docks, all located on the east side of the Willamette River, is performed by the Union Pacific Railroad. . . . The *Union Pacific Railroad, who perform the switching at Terminal 4, have (sic) also done a yeoman job, often going far out of their way to help us when the need arose.*" (App 247) (emphasis added).

Appellants have argued that a letter attached to Crown's Petition for Reconsideration is evidence that

SP&S and UP cannot and will not provide adequate and efficient service to Peninsula in the future (Jurisdictional Statement, p 14). The document involved, which is reproduced on pages 577 and 578 of the Appendix has no bearing on service via Peninsula, which appellants either inadvertently or otherwise failed to mention.

What the letter describes is service on traffic between Crown's Waterways Terminal in South Rivergate and Albina via the Union Pacific Barnes Yard. The Waterways Terminal is 3 to 4 miles from Peninsula (App 442), is not connected with trackage served by Peninsula, and receives switching from Union Pacific through Barnes Yard (App 233).

The letter itself portrays an efficient, economical and adequate service by tracing the procedure to be followed in handling SP cars from the time of order to return. When an excess of 25 outbound loads are tendered, UP will run a South Rivergate to Albina special, otherwise, UP will perform additional service for other shippers and receivers en route (App 577-578).

The Commission also correctly found that Willamette Wood Products, Inc., Morrison Oil Company, and Serendip Industrial Minerals of Portland, all support the application of SP&S and UP (App 21).[6] See Appendix 291-294 for the supporting statements of these Peninsula shippers, and pages 474-476; 484-497 for cross-examination thereon.

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[6]Five interested witnesses offered prepared statements in support of SP&S and UP with three actually testifying (R 27, Ex 30-34).

Appellants have ignored all of the foregoing testimony and concentrate their claim concerning a service deficiency on SP's Exhibit 45 and what they term to be the "unanimous agreement" of joint applicants and others (App Brief 27). What appellants term unanimous agreement on inadequate transit time was based solely on cross-examination questions which were never phrased to encompass the necessary railroad handling between the points involved and always dealt with running time.

Questions were phrased ". . . that it took 24 hours plus to move 6 miles . . ." (App 366). "That 30 hours or more from Albina to North Portland interchange is adequate service . . ." (App 431). "Or . . . do you consider 30 hours a reasonable time and adequate service to move cars a distance of about 5.2 miles . . ." (App 552). "Would it surprise you if I were to tell you it took 37 hours" to spot a car "on the Peninsula Terminal interchange track" (App 488).

The foregoing questions obviously dealt only with transit time of an engine and two or three cars with open track and not the railroading involved in handling an interchange move, with the attendant train preparation and car accumulation. The further questioning of Witness Nenow, the rail labor representative referred to by appellants, demonstrates this (App 552-554).

SP's Exhibit 45 purported to be a sample showing time lapse between the SP interchange with UP (or Portland Terminal-SP&S) and Peninsula. The exhibit itself clearly demonstrates that the use of average ex-

perience is of little or no value in determining sufficiency of service.

Exhibit 45 was a study conceived and prepared by SP in its effort to show poor service—not by shippers or consignees complaining of existing service. It covered 44 SP loaded and empty cars moved in the year 1967 and shows a time lapse of from 5 hours and 30 minutes up to 440 hours. The testimony of Witness Hardin, in which he reviewed approximately 20 of the entries on Exhibit 45, shows that a number of long delays were caused by mishandling of SP in forwarding proper information (App 572-573). In at least ten cases, cars were received at Albina on Friday or on a holiday and were not physically delivered until just prior to the next working day, an actual benefit to the industry (App 573-574). Three of those examined were tendered empty and were spotted ahead of the date they were ordered (App 575).

Shippers and receivers on Peninsula, and for that matter on any rail line, know the service available to them, that is, the time of day traffic is picked up and set out. In this case, with UP picking up around 6 a.m., shippers on Peninsula know that any cars spotted on the interchange track at 9:30 or 10 in the evening will not be picked up until the following morning. At least seven cars shown on Exhibit 45 are in this category. Lapsed time is therefore no basis for judging adequacy of existing service and standing alone is no criteria by which to judge the ability to meet future service needs.

The foregoing shows appellants offered no real evidence of deficient service. They did not and could not show that time lapse interfered with the orderly conduct of business by shippers and receivers who are aware of traffic schedules and know that expedited handling is available when they need it. The absence of evidence of shipper dissatisfaction underlines this fact.

In striking contrast to appellants' contention that the Commission has taken a narrow view of public interest, appellants have avoided any assessment of the adverse effect inclusion of access by SP and Milwaukee would have on all segments of the public.

On this point the Commission correctly found:

> "The adverse effect on SP&S and UP and the shippers dependent upon them for service of admitting SP and Milwaukee into ownership and control of Peninsula would outweigh any advantage accruing to SP, Milwaukee and the Rivergate industries of four railroad ownership." (App 33).

Appellants and USA limit comments on "adverse effect" to an inference that UP and SP&S do not compete with appellant railroads for traffic off their direct lines (App Brief 16) (Brief of USA 12). This is simply not true; for rail carriers serving an area in one way or another compete with all others for traffic routes either directly or through connecting lines, except in those few areas served solely by one railroad. None of SP's so-called "single line states" such as California, Arizona, New Mexico and Texas are solely served by that company. At any point where a competing line also serves,

competition exists and revenue loss, which is one adverse effect, could, in fact, be quite substantial.

Added congestion brought about by the wasteful and duplicative proposed service is the prime adverse effect of SP and Milwaukee inclusion. Congestion on applicants' lines was covered in detail before the Commission and the District Court. Witnesses Westergard, Baker, Hardin and Smith gave extensive testimony on the subject (App 277, 376, 554-555, 563-571). [See portions of Examiner's Report appended to the Commission's decision (App 48-52).]

In substance, this evidence demonstrates that the BN and UP main lines connecting and passing North Portland even under normal operations come under extremely heavy use (App 50). The exclusive UP facilities involved here are used to near capacity 24 hours a day (App 50).

If admitted, the presence of SP and Milwaukee would not permit a decrease in operations of applicant lines and would add substantially to the burdens just noted. Close coordination of operations between a minimum number of carriers must be continued to avoid costly and dangerous operating conditions and to maintain efficient adequate service not only to the Peninsula-North Portland territory but also to other segments of the public relying on all Portland railroads for their transportation requirements (App 555, 567-569).

Appellants' evidence has failed to meet the burden which is clearly upon them and the Commission's finding on this point is correct.

2. Service Proposal to Milwaukee for North Portland.

On the record, Milwaukee suggested as satisfactory service for a connection with Peninsula that BN be permitted to handle its cars on a contract or "puller arrangement" (Milw Brief 18) if congestion at North Portland would not permit Milwaukee's direct handling. As noted before, congestion in and around North Portland now slows operations in the area (App 50, 376-377, 563-564). However, such an agency arrangement must be based on a plain right of Milwaukee to serve North Portland directly itself, as an agent cannot perform for another carrier a service which the principal carrier could not do for itself.

The physical movement by BN of cars for Milwaukee would be virtually identical whether the service is performed under a contract switch, absorption of the tariff switch or joint through rates or routes. Milwaukee presently has joint through rates and routes available. It can also reach Peninsula industries by absorbing switch charges.

UP and BN do not concede that Milwaukee now physically connects with Peninsula (without which the contract switch method is not available). BN is willing to permit Milwaukee use of the North Portland Yard including connecting tracks to afford an interchange with Peninsula on the usual joint facility basis, but continues its opposition to Milwaukee's inclusion as a joint owner of Peninsula. Union Pacific is willing to join in such proposal for the use of the North Portland Yard provided (1) Milwaukee cars are handled by BN as Mil-

waukee's agent, and (2) Milwaukee relinquishes its request for inclusion in ownership of Peninsula. With these trackage rights, Milwaukee could take advantage of any contract arrangement it has with BN, on its assumption of a fair portion of interest rental on the property open to its use as well as a prorata share of the maintenance and operating costs involved in handling the North Portland interchange with Peninsula.

Milwaukee would then have available direct service to Peninsula at a price it contends is necessary to be competitive, and applicants and Peninsula would not be subjected to additional congestion caused by Milwaukee's direct entry to the North Portland interchange. With the foregoing cost benefit, there is no reason why Milwaukee should be included in the control of Peninsula.

The following portions of this brief, directed at specific contentions of Milwaukee, are pertinent only if Milwaukee refuses to accept this proposal.

3. The Commission correctly decided Milwaukee's Petition for Inclusion under the same public interest criteria as the Petition and Application of Southern Pacific rather than as a petition to carry out the provisions of Condition No. 24 in the Northern Lines Merger.

This section answers pages 30 and 31 of the Brief of Appellants, the Supplemental Brief of Appellant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and pages 25 through 32 of the Brief of the United States. As we have previously pointed out, page 10, *supra*, none of the issues raised under this heading was noted or argued in the Jurisdictional Statement and,

pursuant to Rule 40(1)(d), they should be disregarded. Nonetheless, we propose to briefly state our position in support of the Commission's handling of the Milwaukee's petition in this proceeding.

The appellants and the United States contend the following excerpts from the Commission's report are erroneous:

> "With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest

criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24[10] (App 29).

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[10]Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of condition No. 24, if any, to Peninsula's tracks which would at that time be partially owned by the Northern Lines."

As the last sentence of the foregoing quotation states, Milwaukee's petition was judged on the same public interest criteria as the petitions and applications of SP rather than as a petition to carry out the provisions of Conditions No. 24(a). The Milwaukee contends the Commission erred and in effect modified Condition 24 (a). This we urge is simply not correct.

Condition No. 24(a) provides:

"24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission:

"(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers."

The contract behind this condition was placed in evidence by Milwaukee Witness Hayes (App 332-337), and the part here pertinent reads:

> "1. *To the extent that NuCo and SP&S can do so it will grant to Milwaukee trackage rights over the present Northern Pacific and SP&S tracks* between Longview Junction, Washington and Portland, Oregon including all main, second main, passing, and industry tracks . . . and the right to construct at its own cost any necessary crossovers to enable the Milwaukee to operate freight trains, engines, and cars between Longview Junction and Hoyt Street Yard . . . with the right to handle freight traffic to and from Longview Junction and Portland and all intermediate points regardless of the origin or destination of said traffic." (App 333-334) (emphasis added).

It was pursuant to the foregoing agreement of BN and Milwaukee that the Commission, in the *Northern Lines* case, adopted Condition 24(a) permitting Milwaukee to extend its operations to Portland, Oregon. See *Northern Lines Merger* case, 331 ICC 228, 281. Thus, the contract and condition must be read together in determining what the Commission granted Milwaukee in the *Northern Lines* case.

The Milwaukee does not, and of course cannot argue that either Condition No. 24(a) or the contract expressly requires Milwaukee's admission to all industries in the Portland area. The fact is, as correctly found by the Commission, the rights which the Milwaukee received in the *Northern Lines Merger* were limited to trackage rights on tracks unilaterally owned by the merged Northern Lines. Not only is this fact clear from

the terms of the condition itself, but it is also clear from the contract which was made between Northern Lines and the Milwaukee implementing Milwaukee's entry to Portland.

Therefore, the Commission was clearly correct when it found:

> "The condition is silent with respect to trackage and territory in which other carriers, such as UP, has a joint interest and the effect of such condition upon such joint trackage and territory was not presented to, nor considered by the Commission." (App 29).

The other findings that purchase of Peninsula was not within the contemplation of the Commission at the time Condition No. 24 was imposed and, therefore, Milwaukee's inclusion cannot be considered to implement that condition are likewise without fault.

The way was left open to the Milwaukee to seek relief under the Northern Lines docket. This was a completely reasonable approach in an order which speaks as of June 6, 1969, since at that time the Northern Lines case was before this court (reaching decision on February 2, 1970, with the merger itself being implemented one month later). There was no certainty as to the outcome of the Northern Lines case at the time the Commission's order was written in Peninsula. The Commission thus afforded Milwaukee an unlimited opportunity to resolve any uncertainty on the record made in support of Condition No. 24(a). Nothing in the Commission's treatment of Milwaukee inhibits its right gained through Condition No. 24 to serve all industries

in Portland including those of Peninsula through the normal methods Milwaukee anticipated would be available to it (App 532). There is thus no basis for finding fault with the Commission's decision pertaining to Milwaukee's Petition for Inclusion.

Milwaukee raises a number of specific arguments which appellees propose to answer in the order presented in Milwaukee Brief.

(a) Implementation of Condition No. 24 of the Northern Lines case does not afford Milwaukee a direct connection with Peninsula.

Both Milwaukee and the United States in their briefs take the position that since Milwaukee's entry to Portland, it directly connects with trackage owned by Peninsula. At page 8 of the United States' Brief is the following statement:

> "The condition (set forth at A 327) provides that Milwaukee shall have direct access on an equal basis to Portland and Portland industries including SP&S tracks which include the track leading to the connection with Peninsula Terminal."

At page 30, this statement is found:

> "If Burlington Northern alone had applied for leave to acquire Peninsula, Milwaukee would plainly have been entitled under Condition 24(a) to reach Rivergate directly through it."

The Milwaukee Brief at page 8 states:

> ". . . Peninsula is an independent terminal railroad whose tracks connect with the Burlington Northern-SP&S main line double tracks extending between Longview Junction and Portland over which Milwaukee proposed to operate its own trains, engines,

cars under its own tariff schedules and billing pursuant to said Condition 24(a)."

Milwaukee also wrongly claims on page 21 of its Brief:

"Upon extension of Milwaukee's operation to Portland in strict compliance with Condition 24, *using only BN trackage*, Milwaukee would directly connect with Peninsula . . ." (emphasis added).

The foregoing contentions clash directly with the facts in this case. Furthermore, they are in direct contradiction of prior statements of Milwaukee in pleadings to the Commission in this proceeding.

For example, in the Milwaukee Supplement to Petition for Inclusion, paragraph V, it stated:

"The intervening trackage between the Peninsula Terminal Company trackage and the SP&S main line, known as North Portland interchange tracks, is shown on map marked 'Exhibit No. 6' attached to the application in the instant proceedings by purple and by yellow lines. *The tracks shown in purple are jointly owned by SP&S, NP and the OWR&N*, and tracks shown in yellow are jointly owned by SP&S, NP, OWR&N and Peninsula Terminal Company." (App 182)

This was not a one time concession by the Milwaukee for in its Brief to the Examiner, it stated:

"If the Milwaukee were not permitted to stop at North Portland to set out and pick up cars for Peninsula, the Milwaukee could contract to have them handled on an agency basis as SP&S does for the GN and NP now. (Tr 109-110). This, however, requires that Milwaukee have the trackage rights because it is fundamental that a carrier cannot have an agent do what it cannot do itself. (Tr pp. 111-112, 164-166)." (R 31, p 45-46).

Also in its Reply to Exceptions, the Milwaukee stated:

> "The interchange tracks are connected to the SP&S main line by a single track extending from a turnout located at Railroad Engineer's Station 92+99.5 to a connection with the interchange tracks jointly owned by Peninsula located at Engineer's Station 89+40.0, a distance of 359.5 feet. This track is owned jointly by the OWR&N (UP), SP&S and Northern Pacific (Ex 26, NSW-1)" (R 45, p 6).

Also, in the cross-examination by Milwaukee counsel of applicants' witnesses, it recognized that the single connecting track, designated in purple on Exhibit 6 to the application and Exhibit NSW 1 (App 273-274), is owned jointly by SP&S-NP and OWR&N (UP) and that Peninsula has no interest therein (App 369, 375, 391 and 438). The attached North Portland-Peninsula print also clearly shows this. Since Peninsula has no ownership in the connecting line, it has no right to reach the main line without permission of the owners.

Conversely, upon entry to Portland, Milwaukee has no right to reach the lines of Peninsula without permission of the owners of the single connecting track. This, however, does not keep Milwaukee from making its own Portland rates and applying them to Peninsula industries through switching absorptions.

Milwaukee first raised the contention that it could connect with Peninsula upon entry to Portland in paragraph IV of its Petition for Inclusion (App 164), and UP denied such connection would exist in paragraph IV of its Reply to that pleading (App 178). Clearly, the assertion is Milwaukee's burden to prove.

In its Petition for Reconsideration to the Commission, the Milwaukee asserted the fact that *Condition 24 is limited to trackage over which the Northern Lines have unilateral control because the Commission had no jurisdiction over Union Pacific* in the *Northern Lines* case. There, Milwaukee argued that the fact Condition No. 24 does not cover tracks at North Portland does not avoid the propriety or need to implement Condition No. 24 in this case (R 51, Argument No. 2, pp 4 and 18 ff).

Milwaukee stated:

> "Before making its reply to that Petition for Reconsideration and agreeing to support the Northern Lines Merger, the Milwaukee entered into an agreement with the Northern Lines setting forth, in general terms, a more definite statement of the conditions they offered. *Obviously, the Northern Lines could not offer the Milwaukee the use of tracks they had no right to unilaterally grant.* The Northern Lines simply offered all they could without the concurrence of some other independent railroad, and the Milwaukee could not in that case ask for more." (R 51, p 19). (emphasis added)

Milwaukee has inconsistently and incorrectly reversed itself on this point. Its argument before this court has no factual support, and whether based on the obvious failure of proof or the inconsistent failure to pursue the issue before the Commission, Milwaukee's argument here forms no basis for reversing the Commission's denial of Milwaukee's inclusion. Nor is there any basis for the United States' assertion that the Commission here seeks to limit "the obligation gravely imposed in *Northern Lines*" (USA Brief 29). The parties here and

in Northern Lines have always known the extent of the obligations under the merger. They coincide with what the Commission now finds. There is plainly no basis for charging a retraction on the promise of Portland entry since Milwaukee itself has never expected use of BN track under joint ownership.

(b) Milwaukee service to Rivergate and Peninsula industries is in no way dependent upon a direct physical connection with Peninsula.

Arguing a converse position (Milwaukee Brief 22), Milwaukee urges it must connect with Peninsula to establish rates and routes with that carrier via North Portland. SP has obtained the same result without connecting, through absorption of switch charges (App 285). Milwaukee can freely do the same on all existing and future Portland traffic.

The requirements of Section 1(4) and 3(4) of the Interstate Commerce Act pertaining to establishment and maintenance of reasonable through routes and rates without preference or discrimination are additional legal safeguards to insure that service of all Portland carriers will be available, as it is now, to Peninsula and Rivergate industries. These sections apply as well to short line wholly-owned connections as Peninsula would be. *Western Pac. R. v. U.S.*, 382 US 237 (1965). Besides these statutory provisions, the Commission prescribed, at the suggestion of SP&S and UP, the so-called standard traffic conditions. See *Detroit, T. & I.R. Co. Control*, 275 ICC 455, 492 (1950), and *Southern Pacific Company—Merger—Pacific Electric Ry. Co.*, 327 ICC 38, 40 (1964). The Commission modified the conditions by not

only requiring Peninsula as the acquired line to comply but also subjecting SP&S and UP to their provisions.

The conditions protect and keep open present routings and channels of trade; require neutral and nondiscriminatory handling of traffic; require that the present nonpartisan traffic and operating relationships existing between Peninsula and lines reaching Peninsula through the lines of SP&S and UP shall be continued; provide that all cars empty or loaded shall be handled indiscriminately; protect the right of industries to use present routes without restraint; AND provide that no routes may be closed without affirmative Commission action (App 35-36).

(c) The Commission's interpretation of Milwaukee's petition, neither confused the issues nor changed Condition 24.

Milwaukee next argues (Milwaukee Brief 25), without reference to the record, that the Commission was confused over what Milwaukee sought stating that "apparently, the Commission thought the Milwaukee's petition for inclusion was an attempt in this case to gain direct access to North Portland and Rivergate by operating its own engines over Peninsula's tracks." (Milwaukee Brief 26)

As to Milwaukee's petition for inclusion and the service sought to be rendered thereunder, the Commission found as follows:

> "By petition filed August 23, 1967, Milwaukee, under Section 5(2)(d) of the Act seeks inclusion in the transaction for authority (1) to purchase one-third of the capital stock of Peninsula . . .; (2) to pay one-third of the purchase price of two diesel locomotives . . ., and (3) to acquire trackage rights

over tracks owned jointly by the joint applicants and connecting SP&S with Peninsula." (App 13)

The Commission had clearly in mind what the Milwaukee sought and Milwaukee's contentions to the contrary simply have no basis in fact.

(d) The Commission approval of SP&S and UP control of Peninsula does not "block" Milwaukee from North Portland.

Here, Milwaukee maintains, again without citation to the record, that joint ownership of Peninsula will foreclose Milwaukee traffic from freely moving via North Portland (Milwaukee Brief 27). Plainly, appellees' objection to Milwaukee and SP gaining a direct entrance to North Portland is based on the burdensome operation it would impose.

When asked why he objected to Milwaukee's use of North Portland with its own engines and crews, SP&S Witness Westergard stated:

"A. 'I don't know how I can say it any differently than what I have said before, that there is an objection. The more movements in and out of those tracks, and I am not just thinking of movements within the trackage, I am thinking of the movements on the green track, every movement, whether it is one car or 50 cars, when you stop they interfere with other traffic that moved on the green track. The more movement there is, the more interference there is and the more congestion. It leads to more congestion.'

"Q. 'And the more business you have, that also leads to the same thing?'

"A. 'I say this even assuming that the business, that the carload traffic, is about the same, but if you

are handling it in two or three movements when you could be handling it in one, there are three trains stopping out there instead of one.'" (App 376).

Southern Pacific raised the same issue contending that SP&S and UP conspired to block it from gaining "direct access" to Rivergate.

SP counsel cross-examined Union Pacific Witness Baker as follows:

"Q. 'Mr. Baker, isn't it a fact that the only reason that the Union Pacific seeks to control the Peninsula Terminal is to block the other railroads serving Portland from reaching Rivergate?'

"A. 'No.'

"Q. 'If your answer is no, why do you object to Southern Pacific having direct access to the Rivergate area?'

"A. 'Because there will be congestion.' . . .

"Q. 'Let's go back. I asked you the question whether isn't it a fact that the reason Union Pacific seeks to control Peninsula is to block other railroads from having access to the Rivergate area. You say no, that is not the fact.'

"A. 'They have access.' (App 397)

* * *

"Q. (By Mr. Wilson) 'Are you telling me, Mr. Baker, that the Southern Pacific can operate into the Peninsula Terminal interchange tracks today?'

"A. 'You joined with us on the rates.'

* * *

"Q. 'If they can't operate out there, how can they serve the Rivergate area except through the Union Pacific?'

"A. 'That is the way you serve it now.'" (App 402)

Milwaukee next contends under *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States*, 366 US 745 (1961), that Peninsula will not be required to join in rates and routes which will short-haul its parents. This argument is purely academic as in addition to switching/absorptions applicants are committed to show no partiality on rate matters toward connecting lines (App 285). Peninsula has since its inception openly made routes with Portland lines. Any refusal by Peninsula (whether independent or controlled) to afford all Portland carriers the same treatment would amount to an unlawful discrimination, and Milwaukee's argument based on the foregoing case is clearly inapplicable.

(e) The contention that the instant application was timed with intent to reduce the territorial scope of Milwaukee's rights in Portland deserves no consideration.

Milwaukee's contentions on this point (Milw Brief 29) were never presented to the Commission nor seriously pursued before the District Court. Beyond that, there is no proof of the inferred conspiracy to sabotage Condition No. 24 nor could there be any since none exists.

Purely and simply the Commission decided Milwaukee's contentions after reviewing the full public interest facets of the case; and dates on which the contract was signed, the application filed, or the *Northern Lines* case argued on reconsideration form nothing more than a specious argument.

(f) The Commission correctly found that granting of Milwaukee's petition would involve an invasion of territory.

Historical evidence describing the development of North Portland and Peninsula, coupled with a glance at the Portland area print attached to this brief, show that carriers in Portland serve distinct territories. The invasion of territory assertion has been covered in a prior section *(1 (c) supra)* and need not be repeated. Condition No. 24 and its implementation were purely permissive. Any rights afforded necessarily took effect only when Milwaukee had the power to act and actually started its Portland service. The contention that Condition No. 24 in effect "stopped the clock" on terminal changes at Portland (apparently on the date of ICC and not court approval) is thus patently erroneous.

(g) The Commission correctly placed the burden of proving contentions in Milwaukee's Petition for Inclusion upon that carrier.

Here, Milwaukee argues (Milw Brief 31) that by footnote to its report, the Commission shifted the burden of showing the relationship between Condition 24(a) and Peninsula trackage to Milwaukee.

The footnote in question reads as follows:

> "Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of Condition 24, if any, to Peninsula tracks which would at that time be partially owned by the Northern Lines." (App 29)

The straight fact is that Milwaukee itself has admitted on this record that it can expect no rights in facilities in which BN owns only a partial interest.

There has been no collateral modification whatsoever of Condition 24; nothing has been taken from Milwaukee which it had a reasonable right to expect, and by operating into Portland it has open access to all industries in the greater Portland area.

In summary it should suffice to say that Milwaukee's contentions place its competitive self-interest above the interest of public shippers and receivers in an efficient, economical and adequate rail service. For these and other reasons noted above, they have no merit whatsoever.

4. The failure of the District Court to accept appellants' antitrust assertions does not sanction a violation of the antitrust laws.

This argument is based on Section 5(11) of the Act, and the parts involved here provide:

> "The authority conferred by this section shall be exclusive and plenary, . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction involved or authorized under the provisions of this section shall be and they are relieved from the operation of antitrust laws and of other restraints, limitations and prohibitions of law, federal, state, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . ."

McLean Trucking Co. v. United States, 321 US 67 (1944), says that the Commission is "to estimate the scope and apprise the effects of the curtailment of com-

petition and consider them along with advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy." (321 US at 87) Accord: *Northern Lines Merger cases*, 396 US at 504 (1970).

Of the many other cases also in accord, *Minneapolis and St. Louis R. Co. v. United States*, 361 US 173 (1959), stands out as bearing a factual similarity. There, two competing applications for control were filed as well as two requests for inclusion. See *T. P. & W.—Control, supra*, 295 ICC 523. There, as in this case, the Commission thoroughly reviewed the various proposals and their effect on competitive rail operations. In each case the object of the application remained a separate entity and no change in competition was effected.

Here, the Commission opened with a detailed review of the contentions of each of the applicants and interveners in this proceeding through its own analysis and through adoption of segments of the Examiner's Report (App 17-21). Though no mention was made of Section 5(11), the following resume shows that full consideration was given to any competitive changes brought about by the proposed transaction:

Some of the salient findings bearing on competition include: (1) That service by Peninsula to its industries "will be unaffected by the substitution of joint applicants' control for that of United" and that it will be "in the public interest for control of Peninsula to pass from the non-carrier, which no longer desires it, to carrier auspices and on this record, the most logical owners

would be Peninsula's connecting carriers." (App 25); (2) That since neither SP nor Milwaukee now connect with Peninsula and have never connected with it in the past, their direct service over objections of SP&S and UP would constitute a new operation and an invasion of territory (App 30); (3) That any increase of SP and Milwaukee in traffic would only be at the expense of joint applicants and railway employees whose jobs would be eliminated (App 31); (4) That four railroad ownership would not increase car supply or increase the chances of track realignment or other construction not beneficial to all owning lines (App 32); (5) That passage of control to applicants is consistent with past and present service rendered in the Peninsula area and that joint applicants have the ability to fulfill future requirements (App 25 and 33); (6) That the adverse effect on SP&S and UP and shippers dependent upon them for service, of admitting SP and Milwaukee to ownership and control of Peninsula, would outweigh any advantages accruing to SP, Milwaukee and the Rivergate industries (App 33); and (7) That evidence of shippers and public agencies fails to establish a present or future need for either SP or Milwaukee ownership of or connection with Peninsula (App 31-33).

Standard traffic, operating and labor conditions supported by applicants were also broadened and attached to the approval (App 35-37). Naturally, the findings in each case must coincide with the evidence and, here, as the foregoing shows, the Commission's decision as a whole provides all findings required by Section 5, including Section 5(11).

5. The Commission properly rejected the common use applications under Section 3(5) of the Interstate Commerce Act.

The conclusions here challenged provide as follows:

"*Common use applications under section 3(5).*—The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R.Co.—Use of Terminal Facilities*, 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location.[11] In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use.

"[11]This case was cited by SP in support of an allegation that an invasion of territory be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation." (App 34)

Appellants here have offered no cases or citations to show a contrary congressional intent and claim they can find no supporting legislative history.

Section 3(5) was part of the Transportation Act, 1920. Prior to that major revision, there was no requirement that terminals of one carrier be opened to use by another carrier unless willingly done. World War I and the experiences of Federal control led the Commission to

recommend to Congress a more liberal use of terminal facilities in the interest of free movement of commerce. This was done, in part, to encourage a voluntary and more economical use of existing terminal facilities through agreements between competing carriers. Section 3(5) was thus intended to open terminals insofar as it could be done reasonably and properly, considering the handling of commerce of the locality (see 1918 ICC Annual Report, p 6). Extending into yards to effect interchanges was not part of this section and was instead covered by a separate section now embodied in Section 3(4) of the Act.

The 1920 Act as a whole was intended to promote development and maintenance of adequate railroad facilities. Preservation of earning capacities and conservation of the resources of individual carriers was then a matter of national concern and it still is.

The building of unnecessary lines or rendition of unnecessary service was viewed as a waste of resources, the burden of which falls on the public. The act further recognized that competition may result in harm as well as benefit and that when a railroad inflicts injury upon its rival, the public usually bears the ultimate loss. See *Western Pacific v. Southern Pacific Co.*, 284 US 47, 52 (1931).

Furthermore, the cases cited in the report squarely support the requirement of prior service to a particular territory. In *Use of NP Tracks at Seattle by GN*, 161 ICC 699 (1930), the Commission plainly stated that had not GN already served the Terry-Union Avenue

district, GN use of connecting track would amount to an extension of line into territory requiring a certificate of convenience and necessity under Section 1(18) of the Act (161 ICC at 704). Section 3(5) relief thus was not available to GN to operate over the intervening trackage of NP until GN established that it already served that particular territory.

Seaboard Airline R. Co.—Use of Terminal Facilities, 327 ICC 1 (1965), affirmed in *Florida East Coast Ry. Co. v. United States*, 256 F Supp 986 (MD Fla. 1966), and also affirmed *per curiam* 386 US 8 (1967), stands for the exact proposition noted by the Commission. The decision was based on the need to continue service to a port at a new location. There was no invasion of territory involved and Section 3(5) was properly invoked.

Appellants' argument that reliance on the factors noted in the *Seaboard Airline* case "is a specious argument," at best, simply does not hold water. The doctrine of "follow the traffic" is well established in transportation law, though its application must clearly be warranted by the facts. A close scrutiny is required of particular service characteristics, involving the broad effects its application would have on the public generally. See *Smith and Solomon Trucking Company, Extension—Camden, N.J.*, 61 MCC 748 (1953), and *Smith and Solomon Trucking Co. v. U.S.*, 120 F Supp 277 (DCNJ 1954).

Erie RR Acquisition, 275 ICC 679 (1950), cited by appellants, actually strengthens the conclusion they seek to overturn.

There, Erie sought user and trackage rights to perform for itself service which the International Railway had for years rendered as its agent. The same service would be continued without an invasion of territory (275 ICC at 287-288).

Erie therefore is cut from the same cloth as the two cases cited by the Commission, and in each case no new line was authorized or duplicative service instituted under the pretext of a Section 3(5) terminal use. See *Chicago & Alton RR Co. v. T., P. & W. Ry. Co.*, 146 ICC 175, 179 (1928).

In short, Section 3(5) has never been used as a substitute for the certificate of convenience and necessity required under Section 1(18) which permits a new service into territory not adequately served. As this court found in *Texas & Pacific Ry. Co. v. Gulf, etc., Ry.*, 270 US 266 (1926):

> "If the purpose and effect of the new trackage is to extend substantially the line of the carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered industries by means of spurs or industrial tracks." (270 US at 278)

The Commission's ruling on Section 3(5) is a logical interpretation in line with prior similar decisions. Where new service is extended into a territory, Sections 1(18) and 5(2) dealing with extensions and trackage rights come into play. Where avoidance of duplicative expenses is involved or a long standing traffic relationship is sought to be maintained, Section 3 (5) is the

proper provision. The Commission's decision on this point is clearly correct.

CONCLUSION

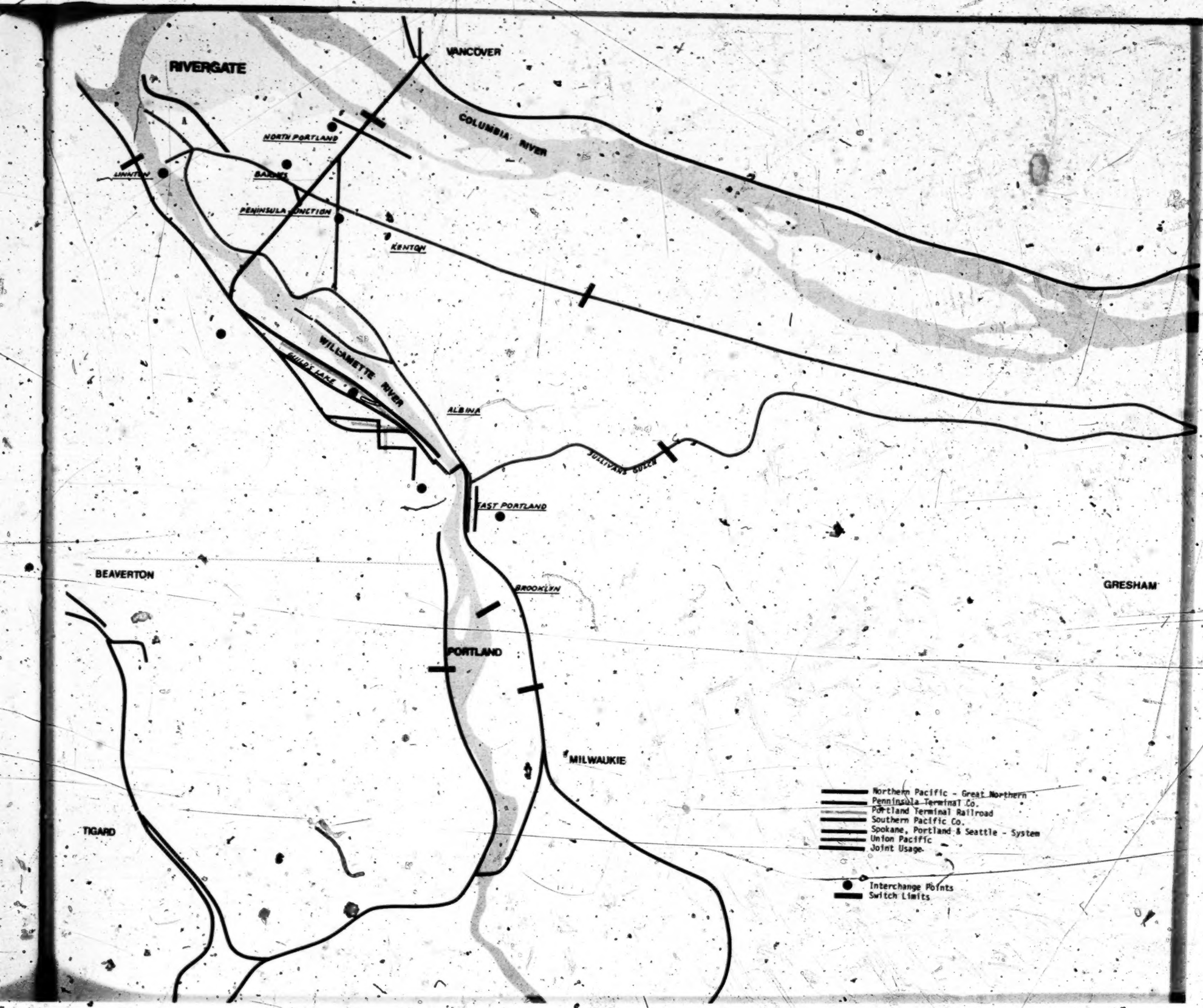
The Commission as final arbiter of public interest—subject to remand only if acting beyond the law or without sound evidence—has found that the public interest will be best served by granting the basic application subject only to routine conditions. The whole transaction with its many applications and interventions was reviewed and decided in an evenhanded manner in accordance with a proper application of the law. Under such circumstances, this court should sustain the decision of the Commission, as did the three-judge court for the District of Oregon.

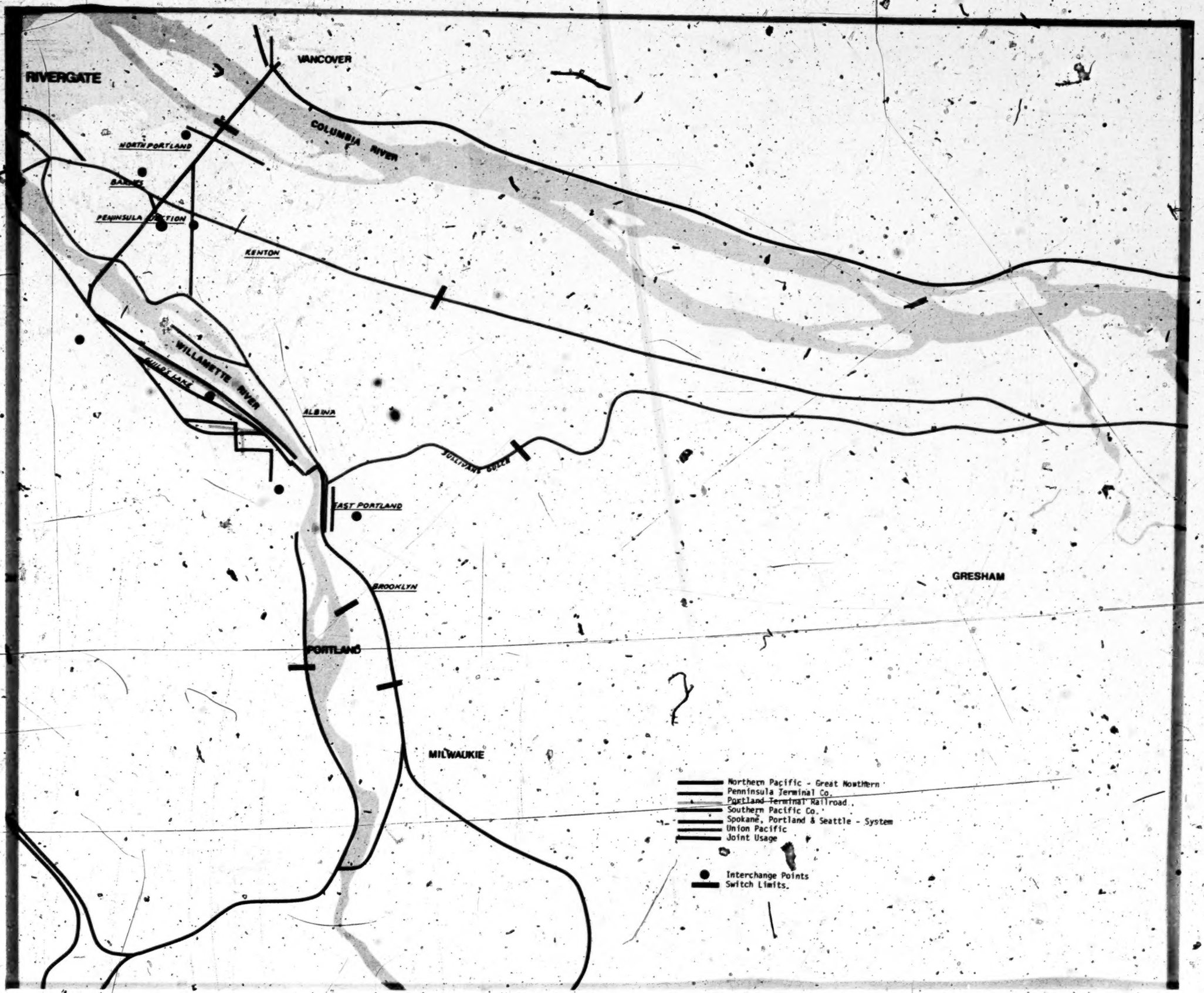
For the foregoing reasons, appellees SP&S and Union Pacific respectfully submit that the judgment of the District Court should be affirmed.

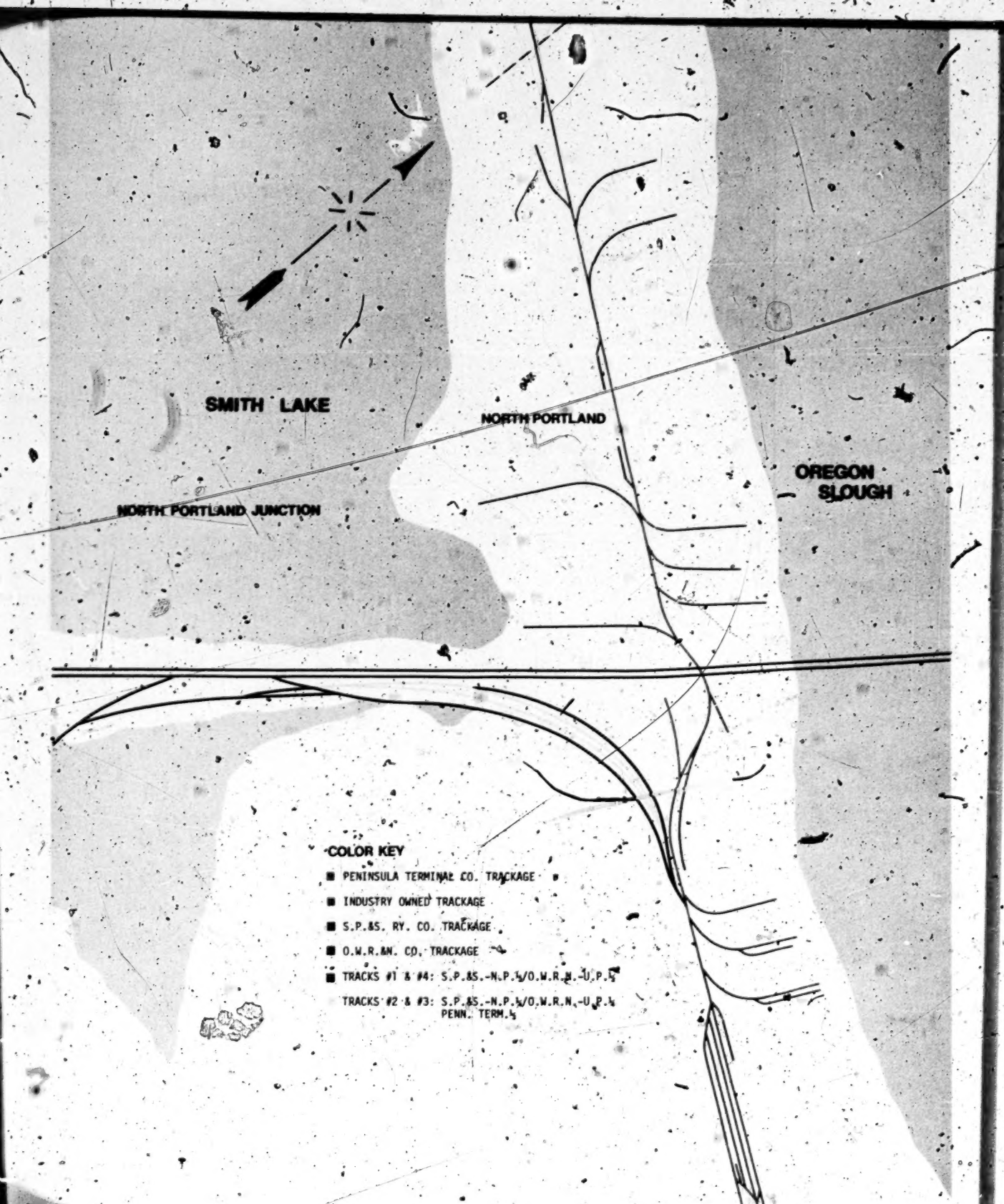
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RIVERGATE
VANCOVER
COLUMBIA RIVER
NORTH PORTLAND
LINNTON
BASIN
PENINSULA JUNCTION
KENTON
WILLAMETTE RIVER
CHILD'S LAKE
ALBINA
SULLIVANS GULCH
EAST PORTLAND
BEAVERTON
BROOKLYN
GRESHAM
PORTLAND
MILWAUKIE
TIGARD
Northern Pacific - Great Northern
Penninsula Terminal Co.
Portland Terminal Railroad
Southern Pacific Co.
Spokane, Portland & Seattle - System
Union Pacific
Joint Usage.
Interchange Points
Switch Limits


RIVERGATE
VANCOVER
COLUMBIA RIVER
NORTH PORTLAND
BARNES
PENINSULA JUNCTION
KENTON
WILLAMETTE RIVER
GUILDS LAKE
ALBINA
SULLIVANS GULCH
EAST PORTLAND
BROOKLYN
PORTLAND
GRESHAM
MILWAUKIE
Northern Pacific - Great Northern
Penninsula Terminal Co.
Portland Terminal Railroad
Southern Pacific Co.
Spokane, Portland & Seattle - System
Union Pacific
Joint Usage
Interchange Points
Switch Limits.


SMITH LAKE
NORTH PORTLAND
OREGON SLOUGH
NORTH PORTLAND JUNCTION
COLOR KEY
PENINSULA TERMINAL CO. TRACKAGE
INDUSTRY OWNED TRACKAGE
S.P.&S. RY. CO. TRACKAGE
O.W.R.&N. CO. TRACKAGE
TRACKS #1 & #4: S.P.&S.-N.P.½/O.W.R.N.-U.P.½
TRACKS #2 & #3: S.P.&S.-N.P.½/O.W.R.N.-U.P.¼
PENN. TERM.¼

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PORT OF PORTLAND ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 70-31. Argued October 20, 1971—Decided June 29, 1972

The Spokane, Portland & Seattle Railway Co. (SP&S), a subsidiary of Burlington Northern, and the Union Pacific (UP) sought Interstate Commerce Commission (ICC) approval under § 5 (2) of the Interstate Commerce Act of a joint acquisition of control of the Peninsula Terminal Co. (Peninsula), whose tracks provide an access route to Rivergate, an industrial complex being developed by the Port of Portland, Oregon. Peninsula would continue to operate as a separate carrier. The Milwaukee and the Southern Pacific (SP), the two other line-haul carriers serving Portland, sought inclusion as joint purchasers of Peninsula, and trackage rights linking their lines with Peninsula, under §§ 5 (2) (b), (c), and (d) of the Act. SP, by a separate proceeding, also sought trackage linking its lines with Peninsula under § 3 (5). The ICC (subject to conditions to protect the traffic of the other railroads) approved the purchase of Peninsula by Burlington Northern and UP, but denied the Milwaukee and SP petitions. It concluded that the adverse effects on SP&S and UP of the proposed four-railroad ownership of Peninsula and accompanying trackage rights would outweigh the advantages to SP, Milwaukee, and the Rivergate Industries. Milwaukee contends that Condition 24 (a) to the Northern Lines merger, which gave Milwaukee access to the Portland area over the Burlington Northern-SP&S tracks, required that Milwaukee be included in the purchase of Peninsula. *Held:*

1. On the record in this case (which is ambiguous with regard to many factual and procedural issues) it has not been shown that the ICC's order authorizing UP and Burlington Northern alone to acquire Peninsula met the "public interest" standard of § 5 (2). Pp. 22–30.

Syllabus

(a) In stressing the small share in Peninsula's traffic that Milwaukee had before the Northern Lines merger, the ICC ignored any possible increase in that share after Condition 24 (a) took effect. Pp. 27–28.

(b) In announcing a principle of preserving the market shares of the two railroads currently connecting with Peninsula, the ICC failed to explain why it was not taking into account the potentially enormous traffic over Peninsula, should Peninsula become the northern route into Rivergate. Pp. 28–29.

(c) The ICC's denial of inclusion of SP and Milwaukee because their gain would work a corresponding loss to Burlington Northern and UP is not a proper approach under § 5 (2), given the principle that the anticompetitive effects of any § 5 (2) transaction must be explicitly considered. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 83–87. Pp. 29–30.

(d) In view of uncertainties about the northern access to Rivergate—given the physical limitations of Peninsula's present facilities—and the apparent fact that physical operation over Peninsula into Rivergate was not at issue here, approval of the ICC order, with its protective conditions, may still be in the public interest, but the announced grounds for the ICC decision do not comport with the applicable legal principles. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88. P. 30.

2. The denial of trackage rights to SP (on the ground that SP was "not entitled to serve Peninsula or Rivergate") should be reconsidered by the ICC in conjunction with the reappraisal of the § 5 (2) issues. Pp. 31–32.

Reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-31

Port of Portland et al., Appellants, v. United States et al. | On Appeal from the United States District Court for the District of Oregon.

[June 29, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves an order of the Interstate Commerce Commission, issued under § 5 (2) of the Interstate Commerce Act, 49 U. S. C. § 5 (2), authorizing the joint acquisition of a heretofore independent switching railroad at Portland, Oregon, by two of the four line-haul railroads serving that city. *Spokane, P. & S. Railway Co. and Union Pacific Railroad Co.*, 334 I. C. C. 419 (1969). The switching railroad, Peninsula Terminal Company, is of current interest to the carriers because it provides an entrance route to the Rivergate Industrial District, a modern industrial and port complex being developed by the appellant, Port of Portland.

The two railroads authorized to acquire Peninsula are the Union Pacific Railway Company ("UP") and the Great Northern Pacific & Burlington Lines, Inc. ("Burlington Northern"), through its subsidiary, the Spokane, Portland & Seattle Railway Company ("SP&S").[1] The two other line-haul carriers now serv-

[1] SP&S was formerly owned by the Great Northern Railway Company and the Northern Pacific Railway Company. These two roads merged to become Burlington Northern. See *Northern Lines Merger Cases*, 396 U. S. 491 (1970). SP&S now operates as an inte-

ing Portland—the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Southern Pacific Transportation Company ("SP")—sought to be included as joint purchasers of Peninsula under §§ 5 (2)(b), (c), and (d) of the Act, 49 U. S. C. §§ 5(2)(b), (c), and (d), and sought trackage rights linking their lines with Peninsula. This appeal arises out of the Commission's denial—in disagreement with its hearing examiner's recommendations—of the petitions of Milwaukee and SP. Together with these two railroads, the Port of Portland and the Public Utility Commissioner of Oregon appeal from the decision of the three-judge District Court affirming, without opinion, the Commission's order. The United States joins the appellants in urging that the judgment below be reversed, while the Commission joins Burlington Northern and UP in urging affirmance. Probable jurisdiction was noted. 401 U. S. 906 (1971).

The question whether the Commission applied the correct legal standards is presented against the background of a complex factual situation—though this is not unusual in the case of railway mergers and acquisitions—and we find it necessary to go into detail concerning the facts and the proceedings prior to the submission of the case here.

I

A. The Rivergate Area and Peninsula's Relation to It

The developing Rivergate Industrial District occupies nearly 3,000 acres at the tip of the peninsula formed by the confluence of the Columbia and Willamette

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gral part of that railroad. Reference to Burlington Northern in this opinion will include its SP&S operation, but SP&S often will be referred to in connection with the proceedings below, where it was the named party.

Rivers. Rivergate's six miles of waterfront will provide docksites for direct deepwater access to the Pacific Ocean. The Port of Portland has expended more than five million dollars of public funds for planning, construction, and development, and it is estimated that ultimate public and private investment in industrial and port facilities at Rivergate will exceed 500 million dollars.

As conceived by its public developers, the Rivergate complex will be served by a domestic transportation network capable of providing efficient and economical service to and from points throughout the Nation. To achieve this goal, the Port's consultants recommended construction by the Port of an internal rail loop which would connect with existing carriers at the southwestern and eastern corners of Rivergate, thus providing Rivergate industries with direct access to all line-haul carriers serving Portland. At full development—estimated to be 15 years in the future—rail traffic generated by these industries is expected to reach between 500 and 600 cars per day, with a projected annual volume of five million tons of freight.

At present, eight industries [2] occupy about one tenth of the Rivergate area. Seven of these are located on the west, or Willamette River, side of Rivergate, and are served by tracks owned by the Port of Portland. Outside rail access to this part of Rivergate is provided by tracks extending from UP's Barnes Yard (point 9 on the schematic map in the Appendix to this opinion)

[2] When the record closed below, the number of industries in Rivergate was five, four of which were located on the Willamette River side of Rivergate. App. 81. By the time the case had reached the Commission, another industry had located on the Willamette River side. According to the Commission's Brief at 38, which no one has contradicted, two additional industries have now located on the Willamette River side.

and connecting with the Port of Portland tracks. Over these external tracks, jointly owned by UP and Burlington Northern, UP provides switching service to the line-haul carriers serving Portland. It is expected that this Barnes Yard route will remain the southwest entrance to Rivergate.

The one other Rivergate industry—the poleyard of the Crown Zellerbach Corporation (Point E on the map)—is located at the easternmost edge of Rivergate, on the Columbia River. Outside rail access is presently provided by Peninsula, which serves, in addition, 13 industries located just southeast of the Rivergate boundary. Peninsula, organized in 1918 to serve a packinghouse facility long since closed, has a main track extending for only 8,000 feet along the Columbia River. At its easternmost end is the North Portland interchange (point 7 on the map), where Peninsula connects with lines owned by Burlington Northern and UP. Since the lines of these two line-haul carriers do not connect directly with Rivergate in this area, access to the eastern end of the Rivergate District is, at present, solely over Peninsula tracks.

Whether Peninsula tracks will remain the sole access to the eastern end of Rivergate is by no means certain. Peninsula suffers from certain physical limitations—its tracks are laid upon sand, its clearances are limited, and the main line is impeded by heavy curvature. Furthermore, the North Portland interchange tracks may have insufficient capacity for the expected Rivergate traffic. Accordingly, an alternate access route to the eastern end of Rivergate is under consideration, that is, a new spur leading directly to Rivergate from the Burlington Northern main north-south tracks.[3]

[3] SP&S and UP had already provided for joint ownership of such a spur in their May 26, 1967, contract for the joint ownership of the line between Barnes Yard and the southwestern part of Rivergate. See Art. XI of this agreement, at App. 313.

B. The Proposed Purchase of Peninsula

All outstanding capital stock of Peninsula is owned by the United Stockyards Corporation. *Stockyards Ry. Co. Control*, 254 I. C. C. 207 (1943). United is not itself a carrier and has no interest in continuing to operate a railroad independent of its stockyard operation. It has been willing to sell Peninsula at the appraised value of its capital stock, and it has no preference as to the purchaser. On February 28, 1967, United entered into an agreement to sell Peninsula to SP&S and UP.[4]

By joint application filed with the Interstate Commerce Commission on July 25, 1967, SP&S and UP sought approval, under § 5 (2) of the Interstate Commerce Act,[5] of their contracted purchase of Peninsula

[4] The agreed purchase price is a total of $299,405 for all outstanding shares of common stock of Peninsula plus the sum of $70,000 to reimburse United for two switch engines sold by United to Peninsula, and representing an unsecured account payable to United. Peninsula's properties consist of 13.17 acres of land, none suitable for industrial development, and 15,559 feet of track including spurs and sidings, or a total of 3.79 miles of main line and secondary and spur track laid on treated ties in sand with no rock ballast. Besides the two above-noted locomotives, including tools and parts for their operation and maintenance, Peninsula owns tools for track maintenance, a conveyance for workmen, a heated engine house for both locomotives, a yard office, and a sand house.

[5] Section 5 (2) of the Act, 49 U. S. C. § 5 (2), provides in pertinent part:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for . . . two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . [.]

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or persons seeking authority therefor shall present an application to the Commission and thereupon the Commission . . . shall afford reasonable opportunity for

from United Stockyards. The application pointed out that the acquisition would enable the applicants to provide rail service to the adjacent Rivergate area over the Penninsula tracks. Peninsula, however, would continue to operate as a separate carrier. No major changes in traffic or revenues were anticipated in the immediate future, though it was anticipated that "within the foreseeable future substantial new traffic and revenues" would be derived from the developing Rivergate area.

In response to the above application, Milwaukee and SP filed petitions seeking inclusion in the acquisition of Peninsula as joint and equal owners, pursuant to §§ 5 (2)(b), (c) and (d) of the Act; in addition, they sought the right to use tracks necessary to connect

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interested parties to be heard. . . . [A] public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . .

"(c). In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

their own lines with Peninsula. The Commission's action on these petitions is the subject of the present appeal. The competing contentions are closely related to the facts of the interconnections between the four line-haul carriers near Rivergate, and to these we now turn.

C. Carrier Interconnections and Switching Arrangements

(1) The North Portland Interchange

At the North Portland interchange (point 7 on the map), where Peninsula connects with Burlington Northern and UP, are four interchange tracks. Two of these are jointly owned by Burlington Northern and UP; the remaining two are owned half by Peninsula, and the other half jointly by Burlington Northern and UP. Only one of these four tracks—one of the two jointly owned by Burlington Northern and UP—connects directly to the Burlington Northern (SP&S) double mainline tracks, running to the north across the Columbia River. In addition, the interchange tracks connect to a single UP track, which extends south through a mile-long tunnel to the UP's Albina Yard (point 6 on the map), a distance of 5.2 miles.[6]

At the time of the hearing in this case, about 30 cars were handled daily at the North Portland interchange. About 61% of this traffic involved switching between the predecessors of Burlington Northern on the one hand and UP and its subsidiaries on the other. Only the remaining 39% involved switching cars designated to or from industries served by Penin-

[6] Although the map reproduced in the Appendix does not make this clear, trains coming north on the UP track from Albina Yard may enter directly upon the Burlington-Northern (SP&S) double mainline tracks just south of North Portland, without passing through the North Portland interchange.

sula.[7] As the only two line-haul carriers connecting directly with peninsula at North Portland, Burlington Northern and UP provide reciprocal switching to any other line-haul carrier whose cars are designated to or from industries served by Peninsula.[8]

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[7] These percentages are based on the figures for loaded or partially loaded cars interchanged at Peninsula during 1967: 2,748 cars designated to or from Peninsula industries; 4,300 interchanged between UP and the predecessors of Burlington Northern. It is not clear from the record how the total figure of 7,048 cars is translated into 30 cars per day—perhaps empty cars are included—but none of the parties disputed the daily or annual figures.

[8] In *Switching Charges and Absorption Thereof at Shreveport, La.*, 339 I. C. C. 65, 70 (1971), the Commission has explained "reciprocal switching" as follows:

"It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of these cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage. In theory the carriers mutually exchange their switching services in these terminal areas, with the effect of extending the lines of each carrier to the other's industries—even on traffic for which they may be directly competitive as line-haul carriers. The scope of these reciprocal switching services is, of course, defined in the carriers' respective tariffs, either by definition of a specific area of trackage, or by identification of the particular industries for which reciprocal switching is held out. Frequently, the switching charges made applicable by each carrier for reciprocal switching are constructed without regard to the actual cost of the service, on the theory that these mutually incurred costs balance out each other. In many instances the line-haul carrier absorbs the reciprocal switching charge, thus placing the off-line industries within a given terminal area on an identical rate basis with its own on-line industries in that terminal area."

(2) The Southern Pacific Connection

Although SP is a line-haul carrier serving Portland, its tracks terminate in East Portland (point 5) and at the Hoyt Street Yard on the other side of the Willamette River (point 3). SP cars designated for industries served by Peninsula are generally switched to UP trains at the latter's Albina Yard (point 6) and moved thence to the North Portland interchange, where they are switched by Peninsula itself to their ultimate destination. Alternatively, the cars may be switched to SP&S trains at the Hoyt Street Yard and moved to North Portland over the SP&S main line. In either case, SP must pay a switching charge to Burlington Northern (SP&S) or to UP (whichever is the switching carrier), and then pay a "rate division" to Peninsula for its switching service.[9] The Peninsula rate division is absorbed by any line-haul carrier subject to it and is thus not passed on to the shipper. The SP&S and UP switching charges may be absorbed by a line-haul carrier if a minimum line-haul revenue per car is exceeded, and SP has done so, except on certain low-rated noncompetitive traffic. SP shared in about 20% of Peninsula's traffic in 1966, and in about 17% in 1967.

(3) Milwaukee's Presence in Portland

Throughout the proceedings below, Milwaukee was not a line-haul carrier serving Portland. Its own tracks terminate at Longview, Washington, 46 miles north of Portland, and through arrangements with SP&S it shared in only one percent of Peninsula's traffic in 1966 and 1967. However, a basic condition of the Commission's

[9] In other words, Peninsula is compensated for its switching service in these cases by a flat division of the line-haul rates. At the time of hearing below, the charge generally amounted to $29.25 per car when the car revenue exceeded $60. App. 79.

approval of the merger of the Great Northern Railway Company, the Northern Pacific Railway Company, and their affiliates, including SP&S, was that Milwaukee be made an effectively competitive transcontinental carrier by being permitted to enter Portland over the lines of the new company, Burlington Northern.[10] Condition 24(a) of the merger required that Burlington Northern

> "shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over [Burlington Northern] lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of [Burlington Northern] facilities at Portland necessary for the switching of traffic to

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[10] The Commission approved the merger on November 30, 1967. *Great Northern Pacific & Burlington Line, Inc.—Merger, etc.—Great Northern Railway Company, et al.*, 331 I. C. C. 228, 869. This Court ultimately affirmed. *The Northern Lines Merger Cases*, 396 U. S. 491 (1970).

Why direct access to Portland was critical to the Milwaukee is made clear by the following quotation from the three-judge District Court opinion in the *Northern Lines Merger Cases*:

"Neither Great Northern nor Northern Pacific would interchange traffic with Milwaukee [at Longview, Washington] except in circumstances which gave Northern Lines the longest possible haul over their own roads. This privilege of Northern Lines not to 'shorthaul' themselves means that traffic originating on the Milwaukee east of of the Twin Cities [and] destined for Portland or California was required to be turned over to one of the merging lines at the Twin Cities. As a consequence, Milwaukee was precluded from being a true transcontinental competitor and was unable to make full use of its extensive trackage ending only a few miles short of Portland. Moreover, Milwaukee was completely precluded from the extensive North-South traffic on the West Coast." 296 F. Supp. 853, 865 (DC 1969).

other railroads and industries. [Burlington Northern] shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers[.]" 331 I. C. C., at 357.

Pursuant to Condition 24(a), Milwaukee commenced service to Portland on March 22, 1971.[11] Since that date, it has published rates reflecting single-line service to Portland industries, including those served by Peninsula, by absorbing the relevant switching charges. It has operated its own locomotives over Burlington Northern (SP&S) lines as far south as the Hoyt Street Yard on the western side of the Willamette River (point 3). If Milwaukee is not allowed to switch cars directly to Peninsula at the North Portland interchange, Milwaukee cars designated for industries on Peninsula will be switched to Burlington Northern (SP&S) trains at Vancouver, on the north side of the Columbia (point 8), at the Hoyt Street Yard (point 3), or at the Guild's Lake Yard (point 2), and moved thence to Peninsula.[12]

D. Milwaukee and Southern Pacific Pleadings Before the Commission

By petition filed August 23, 1967, Milwaukee sought inclusion in the proposed purchase of Peninsula by Burlington Northern (then SP&S) and UP. Section 5(2)(d) of the Interstate Commerce Act authorizes the

[11] Since the instant case was litigated below on the express assumption that the Northern Lines Merger, and the accompanying condition, would ultimately be affirmed, the Milwaukee's current operation does not constitute a "change in circumstances" so much as a realization of the assumption.

[12] The briefs do not clearly reflect under what arrangements Milwaukee cars have been reaching Peninsula since March 22, 1971, though it is plain that Milwaukee trains have not been moving directly to the North Portland interchange.

Commission to require such inclusion as a prerequisite to its approval of the purchase "upon a finding that such inclusion is consistent with the public interest." After first setting out its impending access to Portland over SP&S lines because of the Northern Lines merger, Milwaukee alleged:

> "The instant transaction, if approved by the Commission without inclusion of Milwaukee upon the terms stated below, would have the effect of foreclosing Milwaukee direct service to all the industries now or in the future to be located on the lines of Peninsula Terminal Company. With fifty percent of Peninsula Terminal Company stock in the hands of Union Pacific Railroad Company, not a party to the contract referred to above, Milwaukee will not have any right similar to that sought by applicants herein . . . to operate over or obtain trackage rights in the lines of Peninsula Terminal Company. Industries on the lines of Peninsula Terminal Company will thus be denied the single-line service of Milwaukee to such points as [various western and midwestern rail centers served by Milwaukee], contrary to the public interest." [13]

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[13] The contract here referred to is a 1966 agreement between Milwaukee and the Northern Lines, the terms of which were incorporated in large part into the Commission's conditions accompanying the approval of the Northern Lines merger. In particular, the agreement provided that Milwaukee could operate over SP&S lines as far south as the Hoyt St. Yard, and that SP&S would provide switching of Milwaukee cars at Vancouver and Portland "to or from industries and connecting carriers to the extent such service is performed by [Burlington Northern] or SP&S for itself or any other carrier." These provisions were the direct predecessors of the vaguer Condition 24 (a), quoted above.

Accordingly, the Milwaukee sought equal inclusion with SP&S and UP in the purchase of Peninsula and, in addition,

> "That Milwaukee be granted the right to acquire trackage rights over intervening connecting trackage jointly owned by applicants, from SP&S main line to Peninsula Terminal Company's lines upon such reasonable terms and conditions, and for such considerations, as Milwaukee and applicants may negotiate, or, failing such negotiations, upon such terms and conditions and for such consideration as the Commission may find just and reasonable." [14]

On December 29, 1967, SP&S and the UP filed replies, arguing, *inter alia:* (1) that even if Condition 24(a) were approved, Milwaukee would still not connect with Peninsula because of the intervening North Portland interchange tracks, jointly owned by SP&S, UP, and Peninsula, and trackage rights over these tracks could not be granted to the Milwaukee in this proceeding; and (2) that joint ownership of Peninsula with the Milwaukee could "lead to a cumbersome, confused and divided management with resulting policy stalemates and serious deterioration of service."

Milwaukee thereupon filed a supplement to its petition for inclusion, stating that

> "in the light of replies of applicants herein to the Milwaukee's petition for inclusion, the Milwaukee alleges that the joint application herein is for the purpose of bottling up the Milwaukee at

[14] A source of confusion in this case has been the extent to which various carriers either would possess or sought to possess trackage rights over Peninsula's main track (as opposed to the interchange tracks at North Portland), so the reader is alerted to tread carefully through the descriptions of the pleadings and the opinions below.

> Portland and impair [*sic*] its ability to provide a competitive service to industries served or to be served by Peninsula Terminal Company contrary to the public interest and the plain intent of the Commission's [report and order in the Northern Lines Merger case]."

Accordingly, the Milwaukee added to its earlier petition by requesting:

> "That applicants be required to grant Milwaukee trackage rights over intervening trackage at North Portland connecting with the yards of Peninsula Terminal Company, both as a condition to participation in ownership of Peninsula Terminal Company *and also under Section 3 (5) of the Interstate Commerce Act.*" (Emphasis added.)

Whether intentionally or not, by requesting trackage rights under § 3 (5), the text of which appears in the margin,[15] Milwaukee divorced the question of *access* to Peninsula from the question of *inclusion in the ownership* of Peninsula. Any trackage rights granted in connection with the petition for inclusion under § 5 (2) would be contingent upon SP&S' and UP's deciding to

[15] Section 3 (5) of the Act, 49 U. S. C. § 3 (5), provides in pertinent part:

"If the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. . . ."

consummate the purchase; trackage rights granted under § 3 (5), however, would be independent of the purchase. In the meantime, by an amended petition filed November 29, 1967, SP joined with the Milwaukee in seeking inclusion under § 5 (2) (d) as an equal owner of Peninsula. It further requested that UP

> "be required to grant petitioner bridge trackage rights over [the Union Pacific] main line and terminal trackage between Peninsula Terminal Company and the Southern Pacific-Union Pacific track connection at East Portland, Ore." [16]

In response to replies that trackage rights to East Portland could not be granted in a § 5 (2) proceeding, SP, unlike Milwaukee, initiated separate proceedings under § 3 (5) (December 19, 1967). It sought orders requiring SP&S and UP to allow the "common use of Peninsula Terminal Company," together with bridge trackage rights over UP lines to East Portland; additionally (or, presumably, alternatively), it sought the "common use of the terminal facilities of Union Pacific between the Peninsula Terminal Company and . . . East Portland, Oregon." [17]

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[16] We are told that "bridge trackage rights," permitting SP only to haul cars from one end of the line to the other, are to be contrasted with "full user rights" or "common use," which would permit SP to serve any industries located along the UP track. See Appellees' brief, at 27.

[17] Like Milwaukee, SP had mentioned § 3 (5) in connection with its § 5 (2) petition for inclusion, asking for

"trackage rights between East Portland and the yards of Peninsula Terminal Company, both as a condition to participation in ownership of Peninsula Terminal Company, and also under section 3 (5) . . ., independently of the request for participation in ownership."

The hearing examiner and the Commission treated this § 3 (5) request as having been superseded by SP's separate § 3 (5) proceedings, which, if anything, sought broader relief. We do likewise.

E. Proceedings Before the Hearing Examiner

The applications, petitions, and replies of the four line-haul carriers were referred to an examiner for hearing upon a consolidated record. The Port of Portland, the Portland Commission of Public Docks, the Public Utility Commissioner of Oregon, and Crown Zellerbach Corporation intervened in favor of the Milwaukee and the Southern Pacific.[18] At the hearings in February and March of 1968, evidence was taken from five shippers in addition to Crown Zellerbach, as well as officers and consultants of the parties and intervenors.

On September 9, 1968, nearly a year after the Commission had approved the Northern Lines Merger, the hearing examiner issued his report. In the § 5 (2) proceeding, he recommended approval of the purchase of Peninsula by Burlington Northern and UP, on condition (1) that SP be included as an equal owner and (2) that Milwaukee be included as an equal owner upon consummation of the Northern Lines merger and upon Milwaukee's commencing operations into Portland.[19]

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[18] Eight railway employee organizations opposed the petitions and applications of Milwaukee and SP. None of their contentions are before us now.

[19] In return for inclusion in the purchase of Peninsula, SP and Milwaukee were to be required to make equal contribution to the cost of the shares of capital stock and the locomotive equipment of Peninsula.

Milwaukee's inclusion in the purchase was made contingent not only on ultimate approval of the Northern Lines merger, but also upon Milwaukee's filing a § 1 (18) request for a "certificate of convenience and necessity authorizing railroad operation between Longview Junction, Wash., and Portland, Oreg." Given Condition 24 (a), the Commission rejected the proposition that a § 1 (18) certificate would be necessary before Milwaukee could begin operating in Portland, and the question is not before us on appeal.

The examiner further recommended that, if the purchase were consummated on the above conditions, SP and Milwaukee be granted

> "the right of access . . . to Peninsula Terminal Company trackage over intervening North Portland interchange tracks, at North Portland, Oreg., presently owned individually or jointly by [Peninsula, SP&S and Northern Pacific, and UP,] upon such terms and compensation for use of such intervening trackage mutually agreeable to the interested carriers, or in the event of failure to agree, as the Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3 (5) . . ."

The examiner found that this right of access "is practicable and would not substantially impair the ability of the owning carriers to handle their business." [20]

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[20] Did this § 5 (2) order grant SP the trackage rights it sought from the Albina Yard? SP contended below that it did, arguing that the only individually owned track in the area which was relevant to the issue was the UP track from North Portland to the Albina Yard, and that the examiner did seem to have in mind all *intervening* tracks. To protect itself on this point, however, SP filed an exception to the hearing examiner's recommendations, arguing that he *should* have granted the requested trackage rights under § 5 (2).

As for Milwaukee's apparent effort to claim a § 3 (5) right to trackage over the North Portland interchange tracks, see Milwaukee's Supplement to Petition for Inclusion, quoted *supra*, we can only say that it was handled very ambiguously by the hearing examiner. The best explanation of his action is that he deemed it unnecessary to grant trackage rights to Milwaukee under § 3 (5), since he was granting them under § 5 (2). Alternatively, he may have thought that Condition 24 (a) gave Milwaukee trackage rights over the North Portland interchange. Milwaukee did not file an exception on this issue and has not pressed it on this appeal. Cf. Brief, at 34.

In the separate § 3 (5) proceedings initiated by SP, the examiner ordered common use by SP of the tracks and facilities of UP for operation between the connection at East Portland and the tracks of Peninsula at North Portland, conditioned, again, upon compensation to be agreed upon by the parties or "just and reasonable" as fixed by the Commission.

In his discussion of the issues, the hearing examiner first announced that he would treat the entire area involved as "one transportation terminal entity." On the subject of inclusion in the purchase of Peninsula, he announced:

> "Existing disparity in charges and treatment of traffic within the Portland switching area is convincing evidence that the greatest economic advantage for equality of shippers and carriers can be accomplished best by equal access and ownership. The most economical and functionally modern transportation facilities are essential to development of Rivergate and the Port of Portland. Limitation of direct access there to two railroads barring on-line solicitation and the direct development interests of the other railroads serving the Portland area is contrary to an environment of unencumbered development and the establishment of a sound transportation system. . . . [D]irect access to all the carriers will enable shippers to deal directly with originating carriers providing on-line service to many points in areas not served by the two initial applicants. Shippers would benefit from elimination of switching charges assessed on non-competitive traffic where one of the applicants now acts as a switching carrier."

On the subject of the SP's § 3 (5) applications, the examiner found that the evidence warranted a con-

clusion that common use by SP of UP trackage between the North Portland interchange and East Portland was "in the public interest, practicable, and would not substantially impair UP's ability to handle its own business." He noted the "almost incredible 30-hour average transit time required for car movements between Albina Yard and Peninsula, a round trip distance of about 10.4 miles, including engine changes, car inspection, and car classification at Albina Yard." With respect to the developing Rivergate complex, the examiner was convinced

> "that access thereto by other line-haul carriers will create greater incentive for improvement of railroad facilities and for elimination of present unsatisfactory conditions in the involved area."

Nor did the examiner think that joint ownership and access by the four line-haul railroads in Peninsula and the proposed trackage rights to SP would curtail competition.

> "To the contrary, shippers in the involved area would be afforded free direct access to all the line-haul carriers' services. Among other things, it would place traffic movements between the Portland area, on the one hand, and, on the other, on-line points of carriers in California and States east thereof, on a more competitive basis with movements between those points over the lines of UP and [Burlington Northern] . . . . Also, Milwaukee would become more competitive with UP and [Burlington Northern] and their connections in providing service to the north and east of Portland. The authorizations, generally, would result in improved competitive service and the fostering of sound transportation in the involved area."

Finally, the examiner did not grant SP's apparent application, pursuant to § 3 (5), for trackage rights over

Peninsula itself. He concluded his discussion with the words:

> "In event the parties elect not to consummate the purchase [of Peninsula] recommended herein further petitions by these carriers requesting access to and operation over trackage of Peninsula pursuant to section 3 (5) of the Act may be filed. Jurisdiction will be retained for that purpose." [21]

F. The Decision of the Interstate Commerce Commission

Burlington Northern and UP filed exceptions to the hearing examiner's recommendations. They contended, *inter alia*, (1) that undue emphasis was placed on the future development of Rivergate, (2) that the hearing examiner erroneously held the Portland terminal area to constitute one terminal entity, (3) that the evidence does not support a four-way ownership of Peninsula, either from a general public or a shipper standpoint, (4) that Condition 24 (a) did not grant Milwaukee access to Peninsula, and (5) that neither use of the North Portland interchange tracks by Milwaukee and SP, nor common use by the SP of UP trackage between North Portland and East Portland, was in the public interest.[22]

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[21] Whether or not SP had in fact sought, under § 3 (5), the right to operate over Peninsula's main track was the subject of strenuous dispute before the hearing examiner. Counsel were unable to agree on the meaning of "common use," so the result of the interchange is not perfectly clear, but SP's counsel appeared to concede that his client sought no more than the right to operate to the North Portland interchange and to connect there wtih Peninsula (in addition, of course, to equal ownership in the stock of Peninsula). In any event, it is clear that the hearing examiner did *not* recommend granting any right to operate over the Peninsula main track, and we note that SP did not file an exception on this matter.

[22] SP&S and UP contended, in addition, that SP and Milwaukee are not "railroads in the territory involved" within the meaning of § 5 (2) (d), and that the Commission, accordingly, did not have

On June 6, 1969, Division 3 of the Interstate Commerce Commission issued its opinion. 334 I. C. C. 419. Though it approved the acquisition of Peninsula by SP&S and UP, it otherwise rejected the hearing examiner's recommendations and denied the petitions and applications filed by Milwaukee and SP. The following conditions were imposed upon the acquisition, "to protect the present routings and interchanges" of Peninsula:

> "1. Under the control of SP&S and UP, Peninsula shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission;
>
> "2. The present neutrality of handling inbound and outbound traffic to and from Peninsula by SP&S and UP shall be continued so as to permit equal opportunity for service to and from all lines reaching Peninsula through SP&S and UP without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise;
>
> "3. The present traffic and operating relationships existing between Peninsula, on the one hand, and all lines reaching Peninsula through the lines of SP&S and UP, on the other, shall be continued insofar as such matters are within the control of SP&S and UP;
>
> "4. Peninsula, SP&S, and/or UP shall accept, handle, and deliver all cars inbound, loaded and empty, without discrimination in promptness or fre-

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jurisdiction to include these two lines in the purchase of Peninsula. The Commission squarely rejected this contention, and since SP&S and UP do not raise it in their briefs here, we assume that the Commission decided the question correctly and discuss it no further.

quency of service irrespective of destination or route of movement;

"5. Peninsula, SP&S and/or UP shall not do anything to restrain or curtail the right of industries, now located on Peninsula, to route traffic over any and all existing routes and gateways;

"6. Peninsula, SP&S, and/or UP shall refrain from closing any existing route or channel of trade with SP or Milwaukee on account of the [authorized purchase of Peninsula], unless and until authorized by this Commission.

"7. Consummation of [the authorized purchase of Peninsula] shall constitute assent by the corporate parents of SP&S, the members of their respective systems, and any carrier resulting from consummation of the Northern Lines cases, to be bound by these conditions to the same extent that SP&S is bound by these conditions; and

"8. Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose." 334 I. C. C., at 436–437.

II

A. "Direct Access"

As a reading of Part I reveals, there seems to have been a certain amount of confusion below as to whether or not actual operation over the main tracks of Peninsula by any of the four line-haul carriers was at issue in this case. Early in the Commission's discussion of the merits, for example, it said:

"[W]e find that since neither SP nor Milwaukee now connect with Peninsula, and have never con-

nected with it in the past, *their direct service to Peninsula's industries* over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory." 334 I. C. C., at 433 (emphasis added)

Laying aside the substantive policy involved in this statement, we do not see how the italicized words can refer to anything but physical operation over tracks wholly owned by Peninsula. Yet, as we have already seen, p. 17 and n. 21, *supra*, the hearing examiner did not recommend the granting of such trackage rights to Milwaukee and SP; and neither of these two railroads filed exceptions to the hearing examiner's report requesting such rights. As for Burlington Northern and UP, the third condition which the Commission imposed on their purchase of Peninsula (quoted at p. 21, *supra*) seems to acknowledge that Peninsula will continue to operate as a separate railroad, handling all the switching from industries located upon its lines to the North Portland interchange tracks.

This matter was not resolved before this Court. The briefs filed by the appellants and by the United States contain many references to "direct access" by the line-haul carriers to Peninsula and Rivergate, again strongly suggesting physical operation over Peninsula tracks. The Commission argues that physical operation on the part of Burlington Northern and UP is not at issue, because ownership alone—all that these two railroads seek—gives no right to operates over the tracks of the purchased railroad. Brief, at 23 n. 15; Tr. of Oral Arg. 30. Milwaukee denies that it ever sought "to switch cars to Peninsula industries with its own engines and crews," Brief, at 34, but no similarly direct statement has been forthcoming from SP.

We have set forth but one of the confusions—factual and procedural—that plague this case. Such confusions

might have been resolved before the case reached us had the three-judge court which initially reviewed these orders written an opinion.

B. The Petitions for Inclusion

(1) Condition 24 (a)

Milwaukee and the United States argued at length before this Court that Condition 24 (a) of the Northern Lines merger by itself requires that Milwaukee be included in the purchase of Peninsula. The Commission considered this point at the very start of its discussion of the merits and stated that Milwaukee's petition for inclusion could not be viewed

> "as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 . . . is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage was not presented to, nor considered by, the Commission. Furthermore, ... the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. . . . . Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24.[10]" 334 I. C. C., at 432.

In its footnote 10, however, the Commission said:

> "Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship

of condition No. 24, if any, to Peninsula's tracks which would at that time be partially owned by the Northern Lines." *Ibid.*

This suggestion that the Commission might consider anew the effect of Condition 24 (a) upon jointly owned tracks leaves us in doubt whether at this point it has made a final determination on the applicability of the condition, or simply a determination that the question should be raised in a different proceeding. We do not find it necessary, however, to resolve this doubt and to rule upon the narrow question whether Condition 24 (a) alone requires that Milwaukee be included in the purchase of Peninsula. No one disputes that the condition had one clear meaning—that Milwaukee would be permitted to run its trains into Portland over Burlington-Northern-SP&S tracks. The Commission took this as its starting point and went on to discuss the merits of both Milwaukee's and SP's petitions for inclusion. We find, for the reasons that will appear below, that the Commission took too narrow a view of the "public interest" and we are in disagreement with its § 5 (2) order.

(2) Evaluating the Public Interest

As an initial matter, the Commission limited its attention to Peninsula alone, rather than considering the "entire Portland area" as "one transportation terminal entity," as the hearing examiner had. Appellants contend that this very first step was error, but we think it wiser to evaluate the Commission's approach as a whole.

A fair summary of the Commission's analysis appears in the last paragraph of its discussion of the petitions for inclusion. There it concludes:

"The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of ad-

> mitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership. We cannot find, therefore, that inclusion of SP and Milwaukee in the title proceeding would constitute a just and reasonable term, condition, or modification of the authority requested by the joint applicants." 334 I. C. C., at 435.

In the preceding paragraphs, the Commission had summarized the evidence presented by the three shippers located in Rivergate which had supported SP's petition and application; it concluded that this evidence failed to establish that benefits would accrue from four-railroad ownership of Peninsula. No mention was made of evidence that tended to establish that "shippers dependent upon" SP&S and UP would suffer from such ownership. It is apparent, therefore, that the dominant factor in the Commission's analysis, outweighing any advantage accruing to SP and Milwaukee from four-railroad ownership, was the "adverse effect on SP&S and UP"; we must examine now the manner in which the Commission characterized this "adverse effect."

First, the Commission said:

> "[W]e find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory." 334 I. C. C., at 433.

We have already observed that this passage suggests direct physical operation over the main track of Peninsula, a matter which appears not to be directly at issue in this case. But it may also refer to the trackage

rights sought by Milwaukee and SP, as a condition to the purchase, which would permit them to connect directly with Peninsula, so the Commission's further treatment of this point is relevant:

> "In the past, the Commission has usually held that sound economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic . . . . See *Minneapolis, St. P. & S. S. M. R. Co. Acquisition,* 295 I. C. C. 787, 802 [1958], and cases cited therein." 334 I. C. C., at 433.

This passage appears to announce the principle that in considering petitions for inclusion in proposed purchases or mergers under § 5 (2), with accompanying trackage rights, the dominant policy is preservation of the market shares of the railroads already serving the location in question, so long as those railroads provide reasonably adequate switching service to other carriers in the area. Whatever doubts we might have, either as to the principle itself or its application to this case, are removed by the critical paragraph which immediately follows the sentences just quoted:

> "As shown in the appendix, SP shared, through connections and use of joint rates and routes, in only about 20 percent of Peninsula's traffic during 1966, and only about 17 percent during 1967. Milwaukee's share, also via connections and joint rates and routes, amounted to only 1 percent during those years. Permitting SP and Milwaukee to acquire access to, and equal ownership of, Peninsula and

> therefore participate in its existing traffic on a direct haul basis will, of course, allow those two railroads to increase their share of Peninsula's declining traffic (3,640 loaded cars handled in 1966 and 2,748 handled in 1967). These increased shares of SP and Milwaukee could only be at the expense of the joint applicants and the railway employees whose jobs would be eliminated by the direct service planned by SP and Milwaukee." 334 I. C. C., at 433.

This discussion strikes us as initially misdirected because it ignores the prospective presence of Milwaukee in this area. In 1966 and 1967, Milwaukee trains were still running no closer to Portland than Longview, Washington, 46 miles away. All through the Commission proceedings, however, it was assumed by all concerned that pursuant to Condition 24 (a) of the Northern Lines merger, Milwaukee would soon be operating directly into Portland over Burlington Northern tracks, as it is today. Granted that Milwaukee had only 1% of Peninsula's traffic in 1966 and 1967, the Commission pointed to no evidence that the Milwaukee share would continue to be this small after affirmance of the Northern Lines merger.

The next difficulty with the Commission's approach relates to the potential growth of Peninsula traffic. The *raison d'être* of this litigation has been the possibility that Peninsula would become the northern access to Rivergate. As we have already noted, this possibility may be remote, given the physical limitations of Peninsula's present facilities. But the Commission nowhere states that the possibility is too speculative to be considered in this litigation. The paragraph we have just quoted, then, reads strangely indeed; for *if* Peninsula becomes the northern route into Rivergate, the estimates we have been given indicate that daily traffic over its line would increase from the 1967 rate of 30 cars per day to over

300 cars per day, assuming that a roughly equal number of cars go out over each of the northern and southern routes from Rivergate. Yet according to the principle announced by the Commission, the public interest requires that Burlington Northern's and UP's 80% share of this potentially enormous traffic be protected.

Such an approach seems to us to fly in the face of the well-settled principle that the Commission is obligated to consider the anticompetitive effects of any § 5 (2) transaction. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 83–87 (1944); *Northern Lines Merger Cases*, 396 U. S. 491, 511–516 (1970). It is not necessary to invoke the precise terms of Condition 24 (a) and decide their applicability to this case, to take cognizance of the fact that prior to the Northern Lines merger, Milwaukee was a weak carrier in the Northern Tier of States. *Northern Lines Merger Cases*, 396 U. S., at 504, 514–516. Condition 24 (a) was not intended to foreclose consideration of Milwaukee's competitive position *vis à vis* Burlington Northern in any other proceeding. Both Milwaukee and SP were entitled to explicit consideration of their economic positions as compared with that of Burlington Northern and UP or, at least, a clear statement why such an inquiry was not appropriate.

Even the one case cited by the Commission in support of its general principle, *Minneapolis, St. P. & S. S. M. R. Co. Acquisition*, 295 I. C. C. 787, 802 (1958), undercuts the Commission's reasoning. There, the Commission denied applications of other lines for permission to acquire tracks and to undertake new construction in territory traditionally served by the Chicago and North Western Railway Company; the latter's economic vulnerability made preservation of its exclusive territory important to the public interest.

There is no indication in the present case that Burlington Northern and UP are economically vulnerable, or

that they in any way need their present share of Peninsula traffic to serve the public interest. We are confronted with two railroads that already control one actual route into Rivergate (via Barnes Yard) and one potential route (any spur leading off the Burlington-Northern-SP&S main-line tracks), and that now seek to acquire, for themselves alone, the one remaining route. The Commission's entire discussion of the anticompetitive aspects of this acquisition can be summed up as follows: to the extent that SP and Milwaukee may gain by four-railroad ownership of Peninsula, Burlington Northern and UP will lose; *therefore* the petitions for inclusion are denied. We do not approve this approach to the case.

Despite what we have said about the Commission's apparent reasoning, it does not necessarily follow that the result it reached was incorrect. Given the uncertainty about the northern access to Rivergate, and given the apparent fact that physical operation over Peninsula and into Rivergate was not at issue, approval of the purchase by Burlington Northern and UP alone, with the eight attached conditions, may be the result most in the public interest at the present time. We note that the Commission retained jurisdiction over the proceedings.

But it is not the role of this Court to arrive at its own determination of the public interest on the facts of this case. Our appellate function in administrative cases is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88 (1943). In this proceeding—where the record is already confused by ambiguities over what was thought to be at issue—we cannot say that the grounds for the agency decision are consistent with the "public interest" standard found in the Interstate Commerce Act. We must reverse and remand for further proceedings.

C. Southern Pacific's § 3 (5) Applications

We turn to SP's applications for trackage rights which would permit it to run trains directly to Peninsula from East Portland. According to the Commission:

> "The intent of Congress in enacting section 3 (5) was to provide a method of avoiding the necessity for incurring unnecessary expenses in duplicating existing terminal facilities by a railroad entitled to serve a particular territory." 334 I. C. C., at 435.

Since SP was "not entitled to serve Peninsula or Rivergate," it went on,

> "we need not reach the questions of whether common use of the facilities involved would be practicable or would substantially impair the ability of Peninsula and UP to handle their own business." *Id.*, 436.

According to the rule applied here, if a railroad is not "entitled to serve" a particular territory, the Commission conclusively presumes that granting § 3 (5) rights would not be in the "public interest." Whether or not such a *per se* rule is permissible under § 3 (5) strikes us as a substantial question of statutory construction. For the following reasons, however, we decline to decide this question in the instant case and include these § 3 (5) proceedings in our remand to the Commission.

First, we note that the two cases cited by the Commission in support of its announced rule, *Use of Northern Pacific Tracks at Seattle by Great Northern*, 161 I. C. C. 699 (1930), and *Seaboard Air Line R. Co.—Use of Terminal Facilities of Florida East Coast R. Co.*, 327 I. C. C. 1 (1965), do not directly present the question at issue, since in each case the Commission decided that the ap-

plying railroad was entitled to serve the area and went on to grant the requested trackage rights.

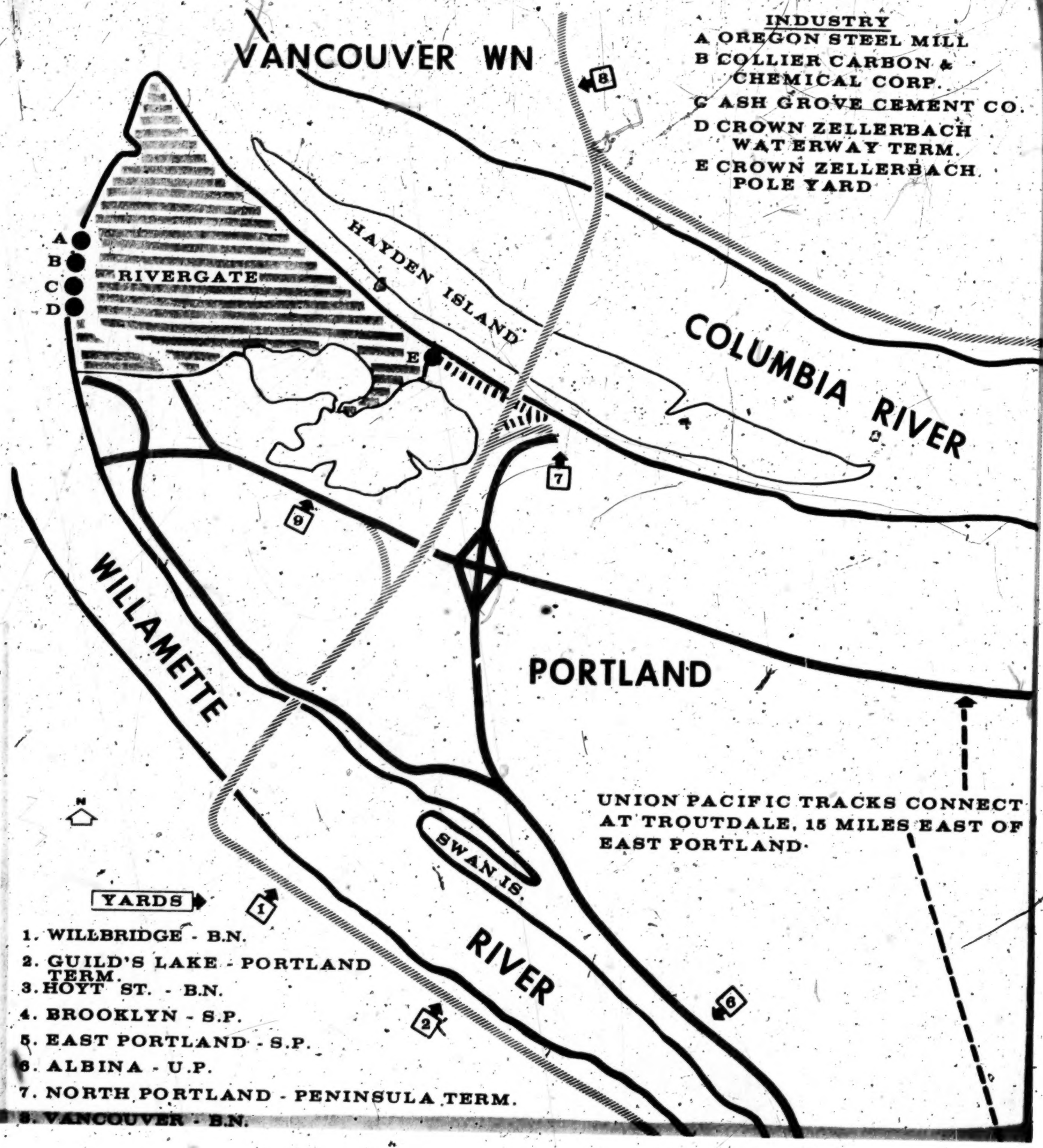
Second, we note that the Commission's brief now defends the ruling below on broader grounds than those that were announced. This leads us to doubt the extent to which the Commission's announced rule is settled ICC law.

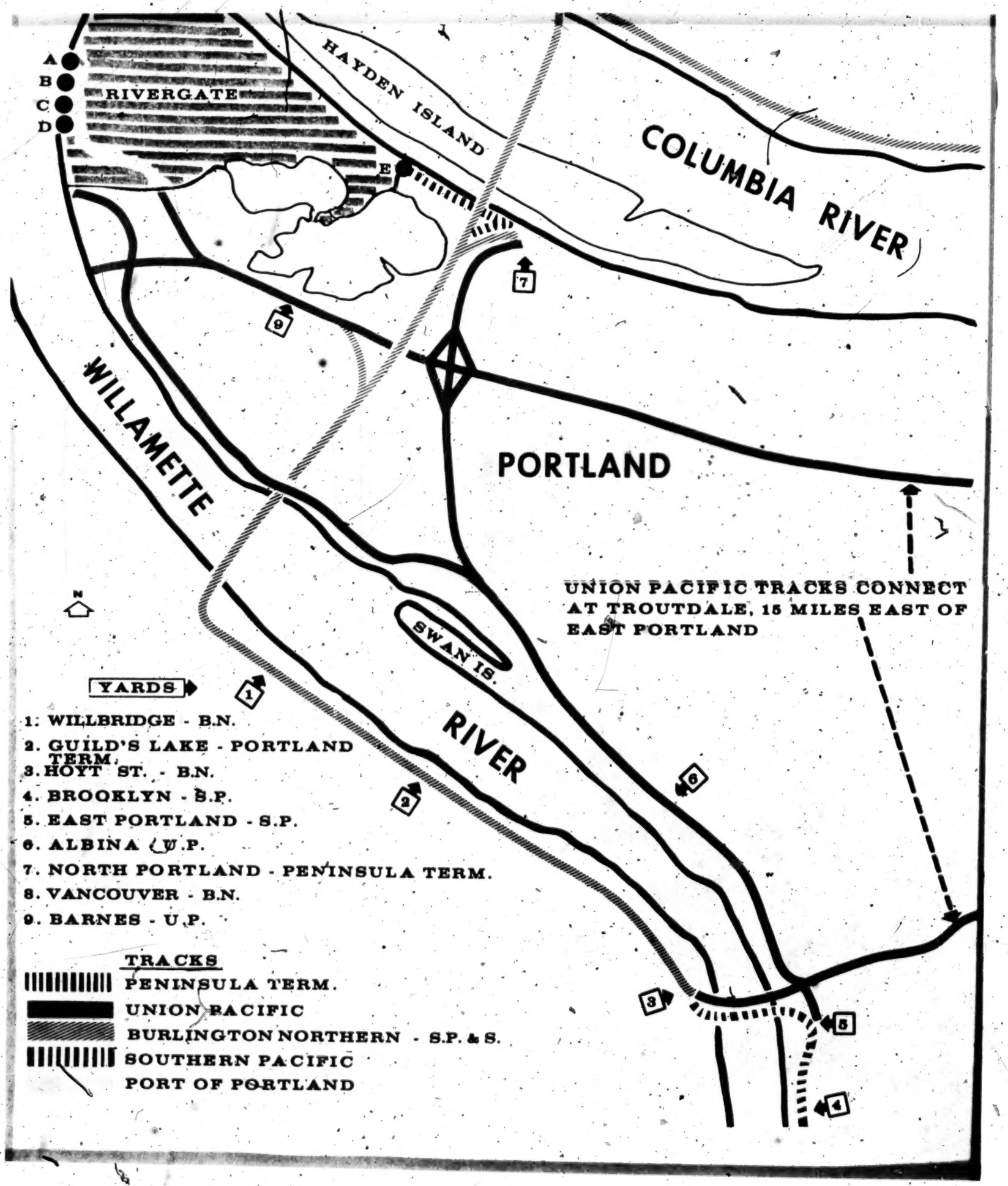
Third, the question of § 3 (5) relief may become moot if the Commission, on remand of the § 5 (2) petitions for inclusion, reverses itself and requires trackage rights for SP as a condition for approval of the purchase of Peninsula, and if the purchase is then consummated.

Fourth, the § 3 (5) applications were considered in close connection with the § 5 (2) petitions for inclusion by both the Commission and the hearing examiner. We cannot say with assurance that the Commission would approach the § 3 (5) applications in the same way after reconsidering the petitions for inclusion in light of Parts II (A) and (B) of this opinion.

The judgment of the District Court is reversed. The case is remanded to the District Court with instructions that it remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.


VANCOUVER WN
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INDUSTRY
A OREGON STEEL MILL
B COLLIER CARBON & CHEMICAL CORP.
C ASH GROVE CEMENT CO.
D CROWN ZELLERBACH WATERWAY TERM.
E CROWN ZELLERBACH POLE YARD
A
B
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RIVERGATE
HAYDEN ISLAND
E
COLUMBIA RIVER
7
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WILLAMETTE
PORTLAND
UNION PACIFIC TRACKS CONNECT AT TROUTDALE, 15 MILES EAST OF EAST PORTLAND
N
SWAN IS.
YARDS
1
RIVER
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1. WILLBRIDGE - B.N.
2. GUILD'S LAKE - PORTLAND TERM.
3. HOYT ST. - B.N.
4. BROOKLYN - S.P.
5. EAST PORTLAND - S.P.
6. ALBINA - U.P.
7. NORTH PORTLAND - PENINSULA TERM.
8. VANCOUVER - B.N.


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2. GUILD'S LAKE - PORTLAND TERM.
3. HOYT ST. - B.N.
4. BROOKLYN - S.P.
5. EAST PORTLAND - S.P.
6. ALBINA - U.P.
7. NORTH PORTLAND - PENINSULA TERM.
8. VANCOUVER - B.N.
9. BARNES - U.P.
TRACKS
PENINSULA TERM.
UNION PACIFIC
BURLINGTON NORTHERN - S.P. & S.
SOUTHERN PACIFIC
PORT OF PORTLAND